93-972

Supreme Court, U.S.
FILED
DEC 16 1993
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No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ELADIO T. FIGUEROA, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Bennet A. McConaughy
Counsel of Record
Edward R. Coulson
Joseph E. Delaney
FOSTER PEPPER & SHEFELMAN
1111 Third Avenue, Suite 3400
Seattle, WA 98101
(206) 447-4400
Counsel for Petitioners

December 14, 1993

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Employees' Compensation Act, 5 U.S.C. § 8101 ("FECA"), preempts claims for non-disabling emotional distress and increased risk of future disease, neither of which result from or constitute existing physical injuries.

2. Whether FECA's provision restricting review of decisions of the Secretary of Labor requires courts to abstain from deciding questions of the scope of FECA's coverage which do not arise from a decision by the Secretary.

3. Whether FECA, contrary to virtually every other workers' compensation statute, bars claims against the United States for intentional or reckless conduct.

4. Whether intentional or reckless conduct by officers of the United States

exposing persons to a danger created by the officers' unlawful conduct violates the exposed persons' constitutional rights to personal security under the substantive due process clause of the Fifth Amendment of the United States Constitution.

5. Whether officers of the United States are entitled to qualified immunity because they are acting as employers rather than law enforcement officials when creating and exposing persons to a danger.

LIST OF ALL PARTIES

The plaintiffs are:

Leo A. Abilo
Bartolome E. Abuan
Bartolome H. Abuan
Rosita P. Abuan
Angela M. P. Abuan
Patricia A. P. Abuan
Vanessa N. P. Abuan
Melanie R. P. Abuan
Esther Leon Guerrero Bukikosa
Shawlon Tiana Bukikosa
Romeo A. Acejo
Elisa Acejo
Pamela A. Acejo
Joy A. Acejo
Romel A. Acejo
Vicente M. Acfalle
Arlene T. Acfalle
Zachery L. T. Acfalle
Vanessa C.T. Acfalle
Eric J. T. Acfalle
Alejandro R. Ada
Ana C. Ada
Jessica R. Tainatongo
Gerry A. Adrillano
Pacita M. Adrillano
Bobby M.Adrillano

Marilyn M. A. Repeki
Maesie M. A. Rote
Perlita M. Adrillano
William Jr. Adrillano
Gerry A. Adrillano
Pacita M. Adrillano
Bobby M. Adrillano
Marilyn M. A. Repeki
Maesie M. A. Rote
Perlita M. Adrillano
William Jr. Adrillano
Levi M. Adrillano
Gilbert J. Rote
Brandon G. Adrillano
William R. Repeki
Mary B. A. Repeki
Carl C. Afaisen
Mae S. Santos
David Afaisen
Jennifer Afaisen
Cecilia Afaisen
Juan O. Aflague
Immaculada S. Aflague
Frankie S. Aflague
Mark D. S. Aflague
Danny T. Agar
Rossana S. Agar
Danny S. Agar, Jr.
Erin S. Agar
Eric S. Agar
Eduardo E. Aguon
Annette B. Aguon
Manuel E. Aguon
Ray R. Aguon
Jeanette E. D. Aguon
Gilbert A. Aguon
Jose C. Aguon
Francia P. Aguon
Linda F. Aguon
Michael V. Aguon
Rudolfo S. Agustin
Brigida C. Agustin
Barbara J. Agustin
Aiisha S. Agustin
Sherina L. Agustin
Rudolfo S. Agustin, Jr.
Adrianne R. Agustin
Athena L. Agustin
Allan B. Alferos
Concepcion B. Alferos
Lorenzo Alferos
Laurens John S. Alferos
Helen L. G. Salas
Gilbert H. Alvarez
Harriet Blas
Melanie J. Alvarez
Jerry J. Alvarez
Gilbert H. Alvarez, Jr.
Bonnie A. Blas
Christopher C. Blas
Jerson Gilbert Blas
Isabel Alvarez
Jason Anthony Blas
Pedro S. Apuron
Rosa G. Apuron
Andrew C. R. Apuron
Pedro S. Apuron, Jr.
Daisy A. J. Apuron
Carl A. Aquino
Josefina L. Aquino
Matthew L. Aquino
Carl A. Aquino
Joseph Q. Aquino
Tahnee L. G. Aquino
Donna M. Gogue
Franklin P. Arteroy
T. D. Artero

Elizabeth M. D. Artero
Pedro A. Atalig
Ann F. Babauta
Marla S. Babauta
Maria B. Cruz
Thomas S. Babauta
Maria M. Babauta
Paul B. Balajadia
Therese B. Briggs
Clarice B. Briggs
Audrey B. Briggs
Byron B. Briggs
Tedorsha B. Briggs
Ramon C. Balajadia, Jr.
Gilda P. Balajadia
Don Ray P. Balajadia
Mitchell P. Balajadia
Larry Sambilay Barrett
Flordeliza C. Barrett
Larizza C. C. Barrett
Lyn D. C. Barrett
Liezl R. C. Barrett
Rogelio V. Basto
Lilia A. Basto
Jeremy A. Basto
Jaydee A. Basto
JoAnn A. Basto
Kimberly A. Basto
Joseph P. Baza
Jose L. G. Baza
Maria P. Baza
Rogelio D. Bejerana
Elsa A. Bejerana
Roel Bejerana
Oliver Bejerana
Eleanor Bejerana Aguon
Laurence Bejerana
Samuel A. A. Bejerana
Bernice A. Bejerana
George R. Bell
Diana S. A. Bell
Lana J. Bell
Caroline A. Bell
Henry J. Bell
Debra M. Bell
Briant G. Bell
Bernadette M. Bell
Luciano C. Bensan
Silveria B. Bensan
Daniel B. Bensan
Crispin B. Bensan
Joseph Camacho Blas
Deborah S. Blas
Christopher J. S. Blas
Joseph J. S. Blas
Brian A. S. Blas
Joseph M. Blas
Juan F. Blas
Juanita B. Blas
Rosie A. B. Blas
Edith M. B. Blas
Mark A. B. Blas
Peter V. B. Blas
Selma H. Guerrero
Tammy J. G. Blas
Donavan C. G. Blas
Augusto B. Blas
Josephia B. Blas
Raymond A. Blas
Doris G. Blas
Raymond A. Blas, Jr.
Franklin M. Borja
Zina M. Santos
Tesha Santos
Kayleen N. Santos
Sheena M. Santos

Jose I. Borja
Arlene B. Baza
George S. A. Baza
Chris Baza
Nick Baza
Analyn Baza
Junior F. Borja
Josephine I. Borja
Jennifer I. Borja
Pedro F. Borja
Rosemarie I. Borja
Lorie A. I. Borja
Ivan I. Borja
Jodi I. Borja
Thomas M. Borja
George C. Borja
Amelia M. Borja
Doines M. Borja
Jeffrey M. Borja
Daniel B. Bunoan
Maria P. Bunoan
Carolyn P. Bunoan
Crystal P. Bunoan
Bridget P. Bunoan
Monica P. Bunoan
Dennis B. Caasi
Deding B. Caasi
Dennis B. Caasi, II
Dennisa Caasi
Roberto E. Cabreza
Beverly C. C. Cabreza
Matthew E. C. Cabreza
Ashlee R. C. Cabreza
Simeon S. P. Cachero
Donald I. Calvo
Maria S. Calvo
Isabel J. Calvo
Genessa S. Calvo
Zeriah K. Calvo
Joshua M. Calvo
Gregory S. Camacho
Bernadette F. Santos
Trina Rose Santos
Kanaryn Joy Santos
Serapio T. Cardines
Anacleto D. Carpela
Vilma C. Carpela
Matt C. Carpela
Rebecca C. Carpela
Rosa C. Carpela
Eleuteria D. Carpela
Anthony Q. Castro
Rose M. Castro
Krystal N. M. Castro
Jacob A. Castro
Beatrice Q. Castro
Jesus S. N. Castro
Anita Q. Castro
Joseph Q. Castro
David B. Castro
Carina D. Castro
David J. D. Castro
Nathan D. D. Castro
Jose R. Duenas
Rosario P. Duenas
Ernest C. Castro
Selina C. Castro
Ernest C. Castro, Jr.
Fanti C. Castro
Joseph C. Castro
John B. Castro
Bernadita R. Castro
Bennett Marie R. Castro
Frank A. R. Castro
Lynette Ann R. Castro
Joseph John R. Castro
Johnny C. Newby
Joseph Michael Newby

John Newby
Noel G. Castro
Ana Garredo Castro
Randolph I. Castro
Ann Marie Quenga Castro
Roseanne Marie Quenga Castro
Rachel Ann Quenga Castro
Richard J. Castro
Mark G. Cepeda
Esper Josita Mondina
Marc R. Cepeda
Jesse B. Chaco
Jesus B. Chaco
Virginia B. Chaco
Jeffrey B. Chaco
John Vincent B. Chaco
Harold Jr. Charfauros
Cecilia M. Charfauros
Verony A. M. Charfauros
Harold Charfauros Jr.
Christina M. Charfauros
Nora L. Charfauros
Luis T. Charfauros
Rosie M. Charfauros
Luis M. Charfauros III
AnnMarie J. Charfauros
John E. M. Charfauros
Justin C. M. Charfauros
Vanessa R. T. Charfauros
Charlie A. Chequina
Eloise T. Chequina
Jose Q. Chiquina
Guadalupe T. Chiquina
Annabel C. Borja
Vincent J. T. Chiquina
Lucinda M. T. Chiquina
Leonides H. Corcuera
Lolita C. Corcuera
Patrocinio C. Corcuera
Francisco C. Corcuera
Julie M. Corcuera
John Gilbert M. Corcuera
Nersty C. Corcuera
Beverly Jane T. Corcuera
Ian Kenneth T. Cunanan
Neil Ross T. Corcuera
Mario Salayon Cortez
Dolores R. Cortez
Swellen R. Cortez
Elder R. Cortez
Jenny R. Cortez
Lourdes G. Cortez
Nenita C. Baldovino
Nelson V. Baldovino
Gloria G. Cortez
Estelita G. Cortez
Jose Adriano G. Cortez
Rogelio G. Cortez
Rodrigo G. Cortez
Neal P. C. Baldovino
Nicolette C. Baldovino
Lourdes C. Aquino

Geraldine C. Baldovino
Kevin C. Baldovino
Renz C. Cortez
Alan S. Cruz
Janet B. Cruz
Josephine S. Cruz
Atanacio A. Cruz
Robin R. Cruz
Josephine C. Alforque
Benny S. Cruz
Gertrudes J. M. Cruz
Jennifer M. Cruz
Yvonne M. Cruz
Maurice V. Cruz
Lisa R. Cruz
Charles G. Cruz
Rita B. Cruz
Charles B. Cruz
Andrew B. Cruz
Eric E. Cruz
Linda M. T. Cruz
Mandy J. Cruz
Nicole E. Cruz
Derrick C. Cruz
Francisco A. Cruz
Ignacia C. Cruz
Marvin A. Cruz
Edwin T. Cruz
Francisco A. Cruz, Jr.
Barbara R. Cruz
Darlene G. C. Pereda
Corina M. Cruz
Dawn N. Cruz
Leonard R. Cruz
Nekita F. Cruz
Arlene J. C. Remis
Naomi S. Cruz
William A. Cruz
Frank S. Cruz
Erbuta D. Cruz
Jean D. Cruz
Glenn R. Cruz
Anna C. Cruz
Naomi C. Cruz
Vanessa C. Cruz
Valene C. Cruz
Isidro P. Cruz
Anita N. Cruz
Isidore D. N. Cruz
Irma P. N. Cruz
Isaac Leo N. Cruz
Jose Acfalle Cruz
Dolores M. Cruz
Jose A. Cruz, Jr.
Mara L. M. Cruz
Douglas K. M. Cruz
Marvin E. Cruz
Jacqueline M. Cruz
Kasie L. M. Cruz
Kenny L. M. Cruz
Koryn L. M. Cruz
Victor S. Cruz
Brigida F. Cruz
Vincent G. C. Cruz
Carmelita A. Cruz
Lelani T. A. Cruz
Dwayne F. A. Cruz
Gerald J. A. Cruz
Vicente M. Cruz
Victoria C. Cruz
Victor S. Damian
Maria S. Damian
Engracio B. Damian
Primo J. Dancel
Kimi N. Dancel
Virginia Dancel
Kiyomi N. Kayo
Munetaka Kayo
Mika D. Kayo
Ken Kayo

Tadashi Kayo
Candido Dela Cruz
Ana B. Dela Cruz
Teresa M. Dela Cruz
Mario G. Delos Reyes
Lydia R. Delos Reyes
Feroza T. Delos Reyes
Imelda D.R. Zacarias
Nia Deen D.R. Lim
Roger B. Delos Reyes
Santiago G. Delos Reyes
Herminia B. Delos Reyes
Helma B. Delos Reyes
Allan B. Delos Reyes
Roy D. Dema-Ala
Stoney Thomas DeMent
LaDonna R. DeMent
Jeffrey S. Reyes
Karlene K. Reyes
Michael A. DeMent
Darrell DeMent
Carlos A. Deocampo III
Clarita A. Deocampo
Carlos C. Deocampo
Leslie E. Dezell
Elizabeth G. Dezell
Steven A. Dezell
Stephanie G. Dezell
Francisco U. Diaz
Antonia C. Diaz
Raymond C. Diaz
James C. Diaz
Frances R. C. Diaz
Claire M. C. Diaz
Vicente C. Diaz
Catherine P. Diaz
Vincent P. P. Diaz
Julian A. P. Diaz
Melissa C. P. Diaz
Mariano D. Doronila
Rosalina J. Doronila
Marfil G. Doronila
Jay J. Doronila
Ilyn J. Doronila
Antonio U. Duenas
Ann C. Duenas
Brian A. C. Duenas
Brandon J. C. Duenas
Johnny Castro Duenas
Mary B. Duenas
Roy B. Duenas
Winnie M. B. Duenas
Juan C. Duenas
Randolph C. Duenas
Johnny C. Duenas
Roland C. Duenas
Frederick C. Duenas
Leonora C. Duenas
Michael C. Duenas
Pauline C. Duenas
William M. Dulla
Ana Selna J. Dulla
Winchell J. Dulla
Annette J. Dulla
Eddie R. H. Dungca
Teodora M. Dungca
Dominic M. Dungca
Darcy James M. Dungca
Mamerto C. Dusaban
Helendres H. Dusaban
Chester Ryan H. Dusaban
Chastity June H. Dusaban
Chona H. Dusaban
Jerry Reyes Enaligo
Margarita R. Enaligo
Jerry R. Enaligo

Andre' R. Enaligo
Jayleen R. Enaligo
Paul Borja Enriquez
Jacqueline I. Enriquez
Krisha L. Enriquez
Caressa C. Cardona
Pedro C. Esteban
Maria D. Esteban
Peter D. Esteban
Mary D. Esteban
Paul D. Esteban
Edward D. Esteban
Bruce A. Estrada
Ofelia A. Estrada
Jenett E. Bozant
Bruce A. Estrada, Jr.
Caroline A. Estrada
Robert A. Estrada
Mary Jane E. Schneider
Annabel A. Estrada
Charles E. Ettleman
Betty Ann Ettleman
Crystal Ettleman
Curtis Ettleman
Joseph Eustaquio
Frances S. Eustaquio
Hope A. Eustaquio
Johnny E. Farnum
Julie Q. Farnum
Johnny Jr. Farnum
Jason C. Farnum
Jaclyn L. Q. Farnum
James P. Fejeran
Jesus C. Fejeran
Serafina P. Fejeran
Francis P. Fejeran
Antoinette C. P. Fejeran
Frances C. Quitugua
Felix Fernandez
Eladio T. Figueroa
Suzette C. Figueroa
Leilani M. Figueroa
Othilia R. Figueroa
Leandra L. Figueroa
Antonio P. Flores
Paul B. Flores
Vicente S. Flores
Maria A. Benavente
Vincent B. Flores
Bruce B. Flores
Albert A. Benavente
Monica A. Benavente
Frederico P. Franco
Leonor A. Franco
Nelson A. Franco
Stella A. Franco
Daniel M. Fujikawa
Kelly R. Fujikawa
Amanda R. Fujikawa
Antonio K. Fujikawa
Augeda M. Fujikawa
Antonio S. N. Fujikawa
Eloy M. Fujikawa
William M. Fujikawa
Joyce M. Fujikawa
Dennis C. Garcia
Matilde T. Garcia
Darrell C. Garcia
Desiree C. Garcia
Dailene C. Garcia
Anthony M. Garrido
Luisa P. Quintanilla
Charles M. Quintanilla,Jr.
Vanessa A. Quintanilla
Chris P. Quintanilla
Valery A. Garrido

Jose Ulloa Garrido
Carolyn R. Garrido
Raul V. R. Garrido
Joshua A. Garrido
Michael L. G. Garrido
Martha I. Garrido
Christopher M. Garrido
Chrisynda M. Garrido
Jesus A. Gogo
Francisco M. Santos
Joseph S. Gogo
Pedro A. S. Gogo
Lourdes G. Rosario
Dolores S. Gogo
Jesus S. Gogo
Vicente S. Gog
Elizabeth S. Gogo
Henry G. Goss
Ana P. Goss
Francis B. Guerrero
Francis E. Guerrero
Asuncion P. Guerrero
Erica P. Guerrero
Jacob P. Guerrero
Francisco Esteban Guerrero
Teresita S. A. Guerrero
Peter J. A. Guerrero
Paul M. A. Guerrero
Andrew G. A. Guerrero
Lawrence D. A. Guerrero
Vivian C. Guerrrero
Matthew R. C. Guerrero
Dolores S. N. Guzman
Duke J. S. N. Guzman
Darry J. S. N. Guzman
Leon S. N. Guzman
Leena D. S. N. Guzman
Duane R. Harrison
Bernice Harrison
Thomas P. Heacock, Jr.
Rafael Hermosilla
Jesse E. Hermosilla
Charles Hermosilla
Wayne Hermosilla
Connie E. Hermosilla
Helen E. Hermosilla
Esther E. Hermosilla
Scott E. Hermosilla
Esmeralda Hermosilla
Juan S. A. Hernandez
Amancio S. Hitosis
Felicita G. Hitosis
Kevin G. Hitosis
Yolanda G. Hitosis
Glenn G. Hitosis
Cecile S. Holloway
Calvin E. Holloway, Sr.
Terence M. S. Holloway
Kimberly S. Holloway
Michelle H. Holloway
Eileen T. Holloway
Milton Holt
Bobby S. Ignacio
Artemio Inocencio
Katsuko S. Inocencio
Dolores S. Inocencio
Teresa S. Inocencio
Monte Inocencio Mathiot
Almitra Inocencio
Francisco S. Isezaki
Vivian S. Isezaki
Franklin S. Isezaki

Francine S. Isezak
Kevin S. Isezaki
Orlene S. Isezaki
Jeremiah S. Isezaki
Joseph G. Jackson, Jr.
Christine M. Manibusan
Shawn Jackson
Ryan Jackson
Derick Jackson
Benedicto V. Laher
Teodora A. Laher
Johnny G. Lava
Augusto C. Laxamana
Candida L. Laxamana
Carolyn L. Laxamana
Elsa M. L. Laxamana
Rex S. L. Laxamana
Hill D. Leon Guerrero
Julia C. Leon Guerrero
Hill C. Leon Guerrero, Jr.
Patrick C. Leon Guerrero
Joann C. Leon Guerrero
Joleene C. Leon Guerrero
Sergio Leon Guerrero
Maria G. Leon Guerrero
Marilyn E.L.G. Quintanilla
James G. Leon Guerrero
Sylvia G. Leon Guerrero
Joseph Jr. G.Leon Guerrero
Edward G. Leon Guerrero
Christine M.L.G. Quintanilla
Richard A. Quintanilla III
Ron L.G. Quintanilla
Naomi N. Leon Guerrero
Richard A. Quintanilla, Jr.
Jeromiah K. P. Lizama
John P. Lizama
Maria P. Lizama
Glenn P. P. Lizama
Gary A. P. Lizama
Bryon T. P. Lizama
Dwayne L. P. Lizama
Jose C. Llamelo
Terry T. Llamelo
Joann M. Llamelo
Jennylynn Llamelo
Joey Jr. Llamelo
Jesse J. Llamelo
Jeanette Llamelo
Alvin P. Lorenzo
Lillian B. Lorenzo
Joshua R. Baluyut
Jaimee B. Lorenzo
Janet B. Lorenzo
Renee A. Lorenzo
Joaquin J. D. Lujan
Brigida P. Lujan
Joanne D. P. Lujan
Joaquin J. D. Lujan, Jr.
Manuel L. Lumbang, Sr.

Hermana A. Lumbang
Claudia C. Lumbang
Susan A. Lumbang
Rene A. Lumbang
Nora A. L. Arellano
Wilfredo A. Lumbang
Pablo R. Lustiano
Ruby S. Lustiano
Richard S. Corbilla
Paul S. Lustiano
Leslie S. Lustiano
Eva M. S. Lustiano
Carlito L. Macaraeg
Virginia A. Macaraeg
Joayde A. Macaraeg
Carlota A. Macaraeg
Jose B. Mafnas
Mae M. Mafnas
Joseph J. M. Mafnas
Carl J. M. Mafnas
Marylee R. M. Mafnas
Michael J. M. Mafnas
Malissa R. M. Mafnas
Jose Santos Mafnas
Bernadita T. Mafnas
John T. Mafnas
Joseph T. Mafnas
Jeffrey T. Mafnas
Bernice T. Mafnas
James T. Mafnas
Juanito E. Magnase
Leonora L. Magnase
Francisco T. Manalisay
Maxima C. Manalisay
Frances A. C. Manalisay
Benny C. Mandapat, Sr.
Elma P. Mandapat
Edwin P. Mandapat
Benny C. Mandapat, Jr.
Bobby P. Mandapat
John A. Manibusan
Geraldine A. Manibusan
Joseph G. Manibusan
Keisha R. Manibusan
Joseph H. Manibusan
Jesusa E. Manibusan
Therese C. Iglesias
Rose M. Castro
Peter P. Manibusan
Lelani M. Manibusan
Charles R. Manibusan
Jovita G. Manibusan
Jose M. Manibusan
Christopher G. Guerrero
Ester M. Guerrero
Myron T. Guerrero
Roy Victor Mantanona
Mary T. Mantanona
Shirley J. Mantonona
Roy Jr. Mantonona
Kenneth B. Mantanona
Lynna A. Mantanona
Jocelyn M. Mantanona
Gene J. Mantanona
Joleen C. Mantanona
Jennilyn T. Mantanona
Danny Marges
Mary Jane J. Marges
Diane J. Marges
Desiree J. Marges
Danny Boy Marges
Oly D. Marquez
Leonides S. Marquez
Ester M. Maillonx
Roderick S. Marquez

Joselito S. Marquez
Gavino T. Mateo
Maria V. Warner
Ronald G. Warner
William L. Meeks
Mary A. T. Meeks
Isaac J. T. Meeks
Bill A. T. Meeks
Lisa M. T. Meeks
Albert P. Mendiola
Evangeline Torres
Bryan R. Mendiola
Alberta M. Mendiola
Stephanie L. Torres
Antonio M. Mendiola
Lucia C. Mendiola
Glenn A. Mendiola
Robert M. Mesa
Florencia M. Mesa
Joaquin M. Mesa
Arnold M. Mesa
Luis M. Mesa
Annie M. Mesa
Rose G. Quintanilla
Nadine S. Quintanilla
Laralynn R. Quintanilla
Reanna J. Quintanilla
Christobal N. Quintanilla
Rosalia G. Quintanilla
Freddie A. Mesias
Jacqueline Mesias
Agustin A. Mesias
Caitlin Mesias
Joel A. Mesias
Caridad A. Mesias
Jesus A. Mesias
Ernesto A. Mesias
Susan A. Mesias
Chona A. Mesias
Esmeraldo M. Monterde
Maria S. Monterde
Frank A. Sablan
Maria T. S. Monterde
Juan T. Naputi
Josephine M. Naputi
Christine M. Naputi
Annette M. Naputi
John H. M. Naputi
Valerie M. Naputi
Baby Jo M. Naputi
Peter J. D. Nauta
Jesus M. Nauta
Maria D. Nauta
Pauline J. D. Nauta
Frederick E. Oakes
Neri C. Ogo
Ioana C. M. Ogo
Michelle A. M. Ogo
Neri H. M. Ogo
Veronica B. Ogo
Josefa J. C. Borja
Joseph A. B. Ogo
Ramon A. B. Ogo
Michele Okiyama Limtiaco
Vicente C. G. Okiyama
Angelina B. Okiyama
Benny A. Okiyama
Cordina M. Okiyama
Eugene D. Okiyama
Abraham O. Ordona
Rosita E. Ordona
Dina R. Ordona Carino
Monica M. Ordona Lacy
Leoneal A. Ordona

Abraham J. Ordona
Aris E. Ordona
Jonathan O. Lacy
Eric V. Carino
Willard J. M. Lacy II
Jacinto M. Pablo
Teresita C. Pablo
Jennifer J. Pablo
Jared J. Pablo
Alfredo C. Pangelinan
Felisa D. Pangelinan
Gregory D. Pangelinan
Fred D. Pangelinan
Benny D. Pangelinan
Rosalinda D. Pangelinan
Monica D. Pangelinan
Alicia D. Pangelinan
Marissa D. Pangelinan
David G. Pangelinan
Doris M. Salas
Joseph F. Pangelinan
Maria B. Pangelinan
Joseph F. Pangelinan, Jr.
Zina M. Pangelinan
Melvin J. Pangelinan
Steven J. Pangelinan
Joseph S. Pangelinan
Maria N. Pangelinan
Marie P. Lizama
Gerald N. Pangelinan
Lisa J. Pangelinan
Scott D. Pangelinan
Christopher J. Lizama
John Q. Lizama
Ernesto S. Patague
Araceli A. Patague
Ernesto A. Patague, Jr.
Eugene A. Patague
Erson A. Patague
Earl J. A. Patague
Ervin A. Patague
Edward A. Patague
Castor N. Patino
Arsenia P. Patino
Ailene Patino
Clarito Patino
Carlito Patino
Juan P. Patubo
Avelina P. Patubo
Irenea P. Fontanella
Albino P. Patubo
Charito R. Patubo
Alvin J. R. Patubo
Alexander R. Patubo
Francisco G. Paulino
Juana M. Paulino
Jenny R. M. Paulino
Michelle M. Paulino
Christine M. Paulino
Timothy F. Paulino
Franklin J. M. Paulino
Matilda L. G. Paulino
Myra R. L. G. Paulino
Anica L. L. G. Paulino
Reiko L. G. Paulino
Francisco G. Pereda
Linda J. Teodoro
Anthony S. Perez
Jacqueline M. E. Perez
Paul A. E. Perez
Teresa M. E. Perez
Antonio P. Perez
Maria F. Perez
Thomas L. Perez

Salvador Perez, Jr.
Concepcion S. N. Perez
Benjamin P. Posadas
Rosemarie J. T. Posadas
Gabriel B. T. Posadas
Jonah J. T. Posadas
Michael A. Prejean
Diane D. Prejean
Matthew A. Prejean
Carol J. Prejean
Bernadita G. Tenorio
Jose A. Hamamoto
David R. Quenga
Rosaleen D. Cruz
Larry Lizama Quenga
Anita S. I. Quenga
Juan B. Quichocho
Martha M. Quichocho
Jesse V. Quichocho
Yvonne M. Quichocho
Cheryl A. Quichocho
John R. Quichocho
James R. Quichocho
Don Steven Quinata
Joaquin N. Charfauros
Natividad Q. Charfauros
Cherilyn B. Reyes
Jesus Q. Quinata
Inez C. Quinata
Lina M. Quinata
Michael J. Quinata
Ricky C. Quinata
Francis P. Quinata
Joaquin Q. Quinata
Maria S. Quinata
Jeffrey J. Quinata
Frankline J. Quinata
Evangeline S. Quinata
Kenny S. Quinata
Sonny S. Quinata
Christopher S Quinata
Roy A. Quinata
Tony A. Quinata
Cecilia R. Quinata
Tony Jr. R. Quinata
Lena R. R. Quinata
Sheela R. Quinata
Sonya R. Quinata
Danny G. R. Quinata
Rosario A. Quinata
Rudy Q. Sanchez
Tom C. Quitugua
Maria C. Quitugua
Frank J. Quitugua
Lisa C. Quitugua
Ryan J. Ragadio
Richard R. Ragadio
Rana S. Ragadio
Andresina A. Ragadio
Richard G. Ragadio
Richard M. Ragadio
George M. Raguindin
Elizabeth G. Raguindin
George D. Raguindin
Yvonne R. Raguindin
Jennifer A. Raguindin
Mark A. Raguindin
Annette M. Raguindin
Enrique C. Rama
Teresita Rama
Joel L. Rama
Jessica L. Rama
Bernardino A. Ramirez
Vincent H. Ramos

Florante R. Rebanal
Susan S. J. Briola
Lucas B. Rebanal
Anthony F. Reyes
Pedro T. Reyes
Helen F. Reyes
Peter F. Reyes
Ashley R. Nanete
Darla Reyes
Ronald Reyes
Jeremia C. Reyes
William C. Reyes
Callen C. Reyes
Wilfred C. Reyes
Ana C. Reyes
Bertrand M. Reyes
Kenneth E. Rhein
Lorraine M. Rhein
Larry Rhoden
Adolpho S. Roberto
Estella C. Roberto
Edward C. Roberto
Brenda C. Roberto
Danny C. Roberto
Jesse A. Rodriguez
Bernice S. Rodriguez
Jesse P. Rodriguez
John A. Rosario
Cecilio C. Sablan
Victoria P. Sablan
Jude G. Sablan
Diana R. Sablan
Jesse A. Benavente
Albert P. Padua, Jr.
Jesse C. S. Benavente
Tessie A. S. Benavente
Diana Jean S. Benavente
Frankie L. G. Sablan
Anita S. Sablan
Arlene S. Sablan
Darlene S. Sablan
Franklin S. Sablan
Glenn T. Salanga
Elaine S. Salanga
Glenn T. Salanga, Jr.
Brian J. Salanga
Jonathan S. Salanga
Sherilynn S. Salanga
Elisha S. Salanga
Joseph M. Salgado
Rosie A. Barrera
Joseph J. Salgado
Donna Lee Salgado
Paul I. Salgado
Eddie I. Salgado
Shirley I. Salgado
Cynthia T. Salgado
Audrey G. Salgado
Ana I. Salgado
Arsenio C. Salumbides
Vincent P. San Agustin
Natividad T. Quenga
Tracy Q. Duenas
Danella Q. Duenas
Delores Q. Duenas
Merissa Q. Duenas
Michelle Q. Duenas
Melanie Q. Duenas
Bobbie Jo T. Quenga
Jacquelin R. Quenga
Carmen Marie San Agustin
Ann Carlene San Agustin
Romulo D. V. Sanchez
Annie M. Sanchez
Romeo J. Sanchez

Audrey T. Sanchez
Ronnie M. Sanchez
Francisco Q. Santiago
Antoinette W. Santiago
Jeremiah W. Santiago
Joseph J. W. Santiago
Anthony G. Santos
Christina L. S. Camacho
Anthony G. Santos, Jr.
Tia Lynn Santos
Henry S. N. Santos
Maria D. Santos
Rosa S. Santos
Henry D. Santos
Jose D. Santos
Annie S. Aguon
Jose M. Santos
Maria M. Santos
Joey M. Santos
Jeanie Marie Santos
Jeffrey M. Stanos
Joyce F. Santos
Joseph S. N. Santos
Acencion S. N. Santos
Domingo S. Santos
JoAnn S. N. Santos
Dwayne S. A. Santos
Mark J. Santos
Walter R. Santos
Juanita M. Santos
Robert D. M. Santos
Eileen E. M. Santos
Therese T. Barcinas
Walter D. M. Santos, Jr.
Phillip R. M. Santos
Tomas D. Santos
Thomas D. Santos
Vicente R. Santos
LoveJoy T. Q. Santos
Liza K. D. Santos
Lenna L. D. Santos
Lugene K. U. Santos
Denise S. San Nicolas
Mancini L. U. Santos
Alfredo S. Silverio
Ofelia N. Silverio
Eliseo N. Silverio
Alfie N. Silverio
Santiago S. Sogo-an
Rosemin M. Sogo-an
Shariffa M. Sogo-an
Sheryll M. Sogo-an
Randy M. Sogo an
Eduardo M. Soriano
Julia B. Soriano
Rick J. B. Soriano
Daniel C. Speight
Martha L. Speight
Yvonne M. Speight
Edward J. Aguigui, Jr.
Antonio R. Suarez
Barbara T. Suarez
Antonio T. Suarez, Jr.
Cristina T. Suarez
Lovelle T. Suarez
Primitivo S. Susbilla
Julia S. Susbilla
Mishella S. Ibit
George C. Taijeron
Julie A. Taijeron
Katrina M. Taijeron
George C. Taijeron
Franc A. Taijeron
Anselmo M. Garrido

Margarita M. Garrido
William R. Taimanglo
Jesse G. Tajalle
Marilyn F. Quintana
Arlene F. Morla
Vicente G. Tajelle
Editha E. Tajalle
Vicente G. Tajalle, Jr.
Justo E. Tajalle
Geraldo E. Tajalle
Jose T. Takano
Perfecto L. Taladoc
Pilar B. Taladoc
Pepito Taladoc
Patricia Taladoc
Perry Taladoc
Perfecto L. Taladoc, Jr.
Rudy T. Tamondong
Mercedes C. Tamondong
Janette E. Tamondong
Leah Ann C. Tamondong
Grace Marie C. Tamondong
Froilan H. Tanghal
Evangeline C. Tanghal
Catherine C. Tanghal
Lawrence C. Tanghal
Valerie C. Tanghal
Toribio A. Tangi
Takiko N. Tangi
Adolfo N. Tangi
Manuel L. Tenorio
Paul E. Tenorio
Amado V. Tenoso
Cristeta P. Tenoso
Thelma P. Tenoso
Mabel P. Tenoso
Morey B. Teruel
Gloria A. Teruel
Michael J. A. Teruel
Jeffrey A. Teruel
Antonio S. Toves
Josephine R. Toves
Leilani R. Toves
Robert J. Benavente
Joreese M. Benavente
Jessica A. Benavente
Suzanne M. Toves
James K. Toves
Agnes T. Cruz
Juan I. Toves
Rodrigo Z. Cruz
Robert S. Toves
Isabel S. Toves
Marlyn Toves
Cynthia S. Toves
Gary S. Toves
Darcy S. Toves
Robert S. Unpingco
Beata Unpingco
Odilia Unpingco
Robinette Unpingco
Pedro Q. Untalan
Cecilia C. Untalan
Erin M. Untalan
Camarin A. Untalan
Charlene B. Untalan
Peter R. Untalan
Vicente I. Untalan
Annie L. G. Untalan
Vicente I. Untalan, Jr.
Alvin L. G. Untalan
Phuoc Van Dinh
Domingo T. Villaflores, Jr.
Maria M. I. Villaflores
Mellanie I. Villaflores

Domingo I. Villaflores II
Melody J. I. Villaflores
Lucas A. Villagomez
Rose Z. Villagomez
Jennifer R. Villagomez
Lucas A. Villagomez, Jr.
Larry C. Villagomez
Matthew J. Villagomez
Zachary R. Villagomez
LeeAnn R. Villagomez
Warlito Villaranda
Catherine C. Bosma
Kurt William Bosma
Wallid Villaranda
Bernard Watson
Thomas J. Garrison
George T. Watson
Bernadette V. Watson
George J. Watson I
Maysha T. Watson
Michael L. Weaver
Mary Ann San Nicholas
Marissa J. San Nicholas
Misty M. San Nicholas
Michael C. Q. Wong
Linda S. D. Wong
Christopher S. D. Wong
Jesus B. Yamanaka
Cecilia Q. Yamanaka
Francisco Q. Yamanaka
Alan J. Yamanaka
Jesse P. Yamanaka
Arlene Y. Hattig
Julie A. Yamanaka
Janet A. Yamanaka
Walter J. Hattig
Walter J. Hattig, Jr.
Alisha N. Yamanaka
Ashley B. Yamanaka

The defendants are:

United States of America
Capt. A.D. Loizeaux
Commander G.E. Monroe
Adm. T.J. Johnson (Ret.)
Capt. Ralph M. Cugowski
Commander John R. Doyle
Lt. Roger M. Natsuhara
Lt. James Hannigan
Capt. Ole L. Oleson
Robert Bieniasz
Lt. Lyndle R. Burton
Dr. Donald E. Sprague
Jesus T. Lizama
John Does 1 Through 20

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ELADIO T. FIGUEROA, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment in Eladio T. Figueroa, et al. v. United States of America, et al., ____ F.3d ____, 1993 WL 411755 (9th Cir. Oct. 19, 1993).

OPINIONS BELOW

The October 19, 1993 Opinion of the United States Court of Appeals for the Ninth Circuit, reversing the trial court's denial of the Respondents' motion to dismiss on qualified immunity grounds and affirming the trial court's granting of Respondents' motion to dismiss on FECA preemption grounds is reported at ____ F.3d ____, 1993 WL 411755 (9th Cir. Oct. 19, 1993), and is reprinted at Appendix A1-39.

The May 29, 1992 Order of the United States District Court for the Territory of Guam Staying Proceedings is unpublished and is reprinted at Appendix A40-54. The April 19, 1992 Order of the United States District Court for the Territory of Guam Re: Motions for Reconsideration is unpublished and is reprinted at Appendix A55-97. The January 17, 1992

Order of the United States District Court for the Territory of Guam Granting in Part the United States' Motion to Dismiss is unpublished and is reprinted at Appendix A98-133. The December 19, 1991 Order of the United States District Court for the Territory of Guam Denying the Individual Defendants' Motion To Dismiss is unpublished and is reprinted at Appendix A134-159.

JURISDICTION

This action arises out of the explosion of a transformer in the Piti Power Plant operated by the United States Navy in Guam, and the clean-up of highly toxic substances released in that explosion. The exposed persons filed an action against the United States and certain officers in the United States District Court for the Territory of Guam. The Respondent United States moved to

dismiss claims of those Petitioners who were federal employees on the grounds that the claims were preempted by the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et. seq. ("FECA"). The Individual Respondents moved to dismiss Petitioners' constitutional tort claims on the ground of qualified immunity. On December 19, 1991, the United States District Court for the Territory of Guam (Rothstein, J. sitting by designation) denied the Individual Respondents' motion to dismiss. Appendix A134-159. On January 22, 1992 the District Court granted in part the United States' motion to dismiss, holding that questions of FECA coverage should be resolved by the Secretary of Labor. Appendix A98-133. Petitioners and the Individual Respondents sought reconsideration of the District Court's decisions and on April 19, 1992 the

District Court denied the Individual Respondents' motion for reconsideration, and granted in part and denied in relevant part Petitioners' motion for reconsideration. Appendix A55-97. On May 29, 1992 the District Court stayed trial court proceedings and granted Petitioners' motion to direct partial judgment under Fed. R. Civ. P. 54(b). Appendix A40-54. Petitioners appealed that portion of the January 22, 1992 Order dismissing the claims of the federal employee Petitioners while the Individual Respondents appealed the District Court's denial of their motion to dismiss on qualified immunity grounds. On October 19, 1993 the United States Court of Appeals for the Ninth Circuit affirmed the trial court's dismissal of the federal employee Petitioners' claims on FECA grounds and reversed the District Court's

denial of the Individual Respondents' motion to dismiss, holding that the Individual Respondents were entitled to a dismissal of Petitioners' claims on qualified immunity grounds. Appendix A1-39.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

> against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Federal Employees' Compensation Act, 5 U.S.C. § 8116(c), provides in relevant part:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action or in admiralty, or by an administrative or judicial proceeding under a Workmens Compensation Statute or under a Federal Tort Liability Statute.

5 U.S.C. § 8128(b) provides in relevant part:

> The action of the secretary or his designee in allowing or

> denying a payment under this subchapter is --
>
> . . .
>
> (2) Not subject to review by another official of the United States or by a court by mandamus or otherwise.

STATEMENT OF THE CASE

I. INTRODUCTION

This case addresses the remedies available to federal employees who suffer injuries as a result of intentional or reckless workplace conduct. The issues include whether federal employees may assert claims in federal court when they are ordered by their supervisors to enter a building highly contaminated with toxic chemicals without protective equipment or training, with full knowledge by those supervisors that the employees will be exposed to toxic chemicals. It also addresses the issue of whether federal employees may sue the United States for emotional distress and other non-physical

injuries arising from intentional or reckless conduct where those claims would not be covered by FECA.

Petitioners are federal employees, their families, and others who were exposed over several months to polychlorinated biphenyls ("PCBs"), dioxins and furans following the explosion of the transformer laden with PCB oil.[1]

Dioxins, furans and PCBs are highly toxic chemicals which cause a variety of serious conditions, including cancer, liver disorders, destruction of the immune system, and birth defects. Fortunately, in some respects, any physical injury from these substances takes a long time to

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[1]Because the claims below were dismissed under Fed. R. Civ. P. 12(b)(6), the factual statements herein are drawn from the complaint, as well as from a report by the General Accounting Office into the circumstances of the explosion and the cleanup.

develop. Unfortunately, during that time, the exposed person lives in constant fear of what may or will happen to him or her in the future.

The United States and its officers set the stage for disaster by ignoring simple and clear regulations for the labelling, handling and maintenance of PCB transformers. Subsequently, federal officials ordered the employees to clean up and operate the contaminated plant without adequate training, protective gear, or site evaluation, knowing that the employees would be exposed to harmful levels of toxic chemicals.

Under these circumstances, neither the government nor its officials should be shielded from liability.

II. FACTS OF THE CASE

A. Misuse of PCBs at Piti Power Plant.

The Piti Power Plant contained several large transformers used in the production of electricity. The transformers were filled with insulating fluid consisting largely of oil combined with PCBs. PCBs were used in transformers because of their conductive qualities and because they do not break down over years of use. This latter quality, although beneficial in the transmission of electricity, is also a cause of PCBs' deadly reputation as a chronic toxic hazard -- PCBs accumulate in human tissues and are very resistant to elimination.

Because of the toxicity and persistence of PCBs, the United States has extensively regulated their use since 1976.[2] These regulations are based upon

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[2]Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2671. TSCA prohibits the manufacture, process or use of PCBs in other than a totally enclosed manner after

well-documented human health and environmental hazards of PCB exposure. 40 C.F.R. § 761.20. Federal law requires all PCBs to be marked with clear and adequate warnings.[3] None of the PCB labeling, maintenance, warning or notice provisions were complied with in any respect at the Piti Power Plant.

On May 26, 1987, transformer One-A exploded and sprayed up to fifty gallons of toxic chemicals throughout the plant. Prior to and during the explosion, the

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January 1, 1978. 15 U.S.C. §§ 2605(e)(2)(A).

[3]15 U.S.C. § 2605(e)(1)(B). 40 C.F.R. § 761.40. In the case of PCB transformers, such as those at the Piti Power Plant, these warnings were required to be in the form of large yellow stickers, at least six inches square, to be in place by January 1, 1979. 40 C.F.R. § 761.40. As of December 1985, all PCB transformers were required to be registered with local fire response personnel. 40 C.F.R. § 761.30(a)(1)(vi). Visual inspections of every PCB transformer were required to be performed every three months. 40 C.F.R. § 761.30(a)(1)(xii).

PCBs were subject to intense heat and pressure, causing a chemical reaction producing dioxins and furans, which are even more lethal than PCBs and among the deadliest toxic substances known to man. The transformer explosion resulted in a deadly toxic fog which blanketed the plant and the men inside at levels up to hundreds of thousands of times higher than permissible under EPA and OSHA regulations.

After the explosion, respondents violated a number of statutory and regulatory provisions concerning hazardous waste cleanup. Because none of the transformers were labeled as required, the plant employees had no idea that the oil which exploded from the transformer

contained PCBs.[4] The employees were directed to gather outside the plant directly in line with a ventilation system which was pumping out contaminated smoke. The officials dismissed half the exposed employees, permitting them to go home without any decontamination, testing or instructions. The employees thus exposed their families to PCBs, dioxins and furans through contact with their person or clothing.[5]

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[4]Contrary to regulations, respondents had not advised the employees of the presence of PCBs in the plant, labeled the transformers as containing PCBs, trained most of the employees in the handling of PCBs, or warned the employees of the consequences of a spill or explosion involving PCBs.

[5]Other employees were sent to the Naval Hospital, Guam, where they waited for hours before being given an opportunity to clean the chemicals from their bodies. They did not see a doctor. They were not warned of or treated for the medical risks of exposure to PCBs, dioxins and furans. They were not advised to wear personal protective equipment ("PPE") in the presence of such

B. The United States And Its Officers Failed to Evaluate The Plant After The Explosion or Provide Adequate Training or Protective Gear.

In violation of EPA regulations requiring an evaluation of the site of a toxic explosion, respondents did not test the plant for the presence of toxic substances other than PCBs. Because of this failure to properly evaluate the site, petitioners were unnecessarily exposed to dioxins and furans.[6]

Respondents did not obtain the PPE required by regulations for over seven months after the spill. Instead, they

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substances. They were not given baseline medical tests, even though regulations required such tests. They were released with no further treatment or advice.

[6]Respondents continued to operate the power plant after the explosion, despite the presence of PCBs, dioxins and furans. Even upon learning on July 13, 1987, of the presence of lethal dioxins and furans, the United States and its officers did not stop clean-up operations.

ordered plaintiffs to work on their hands and knees in a confined hazardous waste enclosure, where temperatures rose to over 120°F, wearing absorbent coveralls and otherwise inadequate protective gear. The respondents did not establish a required separate decontamination facility until over three months after the explosion.[7] Until this facility was in place, the employees dressed, rested, and ate meals

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[7]Employees were allowed to take their work clothing home, where it was mixed with clothing of their families. They were given garbage bags as foot gear; the garbage bags tore on grating in the plant. The personal shoes worn by the employees absorbed these toxic chemicals and were then worn home. The employees were given plastic gloves that tore and dissolved upon exposure to solvents used in the clean-up operation. Employees were provided inadequate half-face respirators: regulations required full-face respirators. The employees charged with operating the plant (as opposed to cleaning it up) were also needlessly exposed to toxic substances by being provided with little if any protective gear.

in a confined space polluted with toxic substances.

The respondents falsely advised employees that the toxic materials would not be absorbed through the porous coveralls provided. In fact, the coveralls absorbed the PCBs, dioxins and furans and held them against the employees' skin.

After petitioners were forced to conduct the bulk of the cleanup of the plant over several months, they were replaced with a private cleanup company. This company, outfitting its employees in "moon suits" and otherwise complying with applicable law and regulations, charged the United States an estimated $10 million simply to do the final portion of the cleanup.

III. PROCEDURAL HISTORY

A. Filing of Case.

Petitioners began this action by filing administrative claims pursuant to the requirements of the Federal Tort Claims Act, 28 U.S.C. § 2671-80 ("FTCA"). Petitioners' administrative claims were denied. Petitioners filed an action in the United States District Court for the Territory of Guam on April 23, 1990. They asserted claims against the United States under the FTCA, and claims against the Individual Respondents under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Federal jurisdiction in the District Court was based on 28 U.S.C. § 1346(b) and 28 U.S.C. § 1331.

B. The United States' Motion to Dismiss.

On September 6, 1991 the United States filed a motion to dismiss. On January 22, 1992 the District Court granted in part the United States' motion to dismiss, dismissing the federal employees' claims on the grounds that the Secretary of Labor should decide whether some remedy might possibly be available to them under FECA.[8]

C. The Individuals' Motion to Dismiss.

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[8]On April 14, 1992, the District Court issued an order on motions for reconsideration, striking certain portions of its January 22, 1992 Order, but leaving intact its decision on FECA. On June 2, 1992 the District Court entered an Order staying proceedings in which it granted plaintiff's request for Rule 54(b) certification of its dismissal of the employees claims against the United States. On July 29, 1992, the District Court entered a partial judgment. Plaintiffs filed a timely appeal from this partial judgment on September 4, 1992.

On September 6, 1991 the Individual Respondents filed a motion to dismiss, arguing they were entitled to qualified immunity. On December 19, 1991 the District Court denied the Individual Respondents' motion to dismiss.[9]

D. The Ninth Circuit Decision.

On October 19, 1993 the Ninth Circuit Court of Appeals issued an opinion affirming the District Court's dismissal of the federal employees' claims on the grounds that courts should defer to the Secretary of Labor whether FECA covers the claims in question. The Ninth Circuit reversed the District Court's denial of the Individual Respondents' motion to

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[9]On April 14, 1992 the District Court denied the Individual Respondents' motion for reconsideration of its December 19, 1991 Order. The Individual Respondents filed a notice of appeal on May 22, 1992, invoking appellate jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1294(4).

dismiss and held that the Individual Respondents were entitled to qualified immunity from the claims for constitutional violations.

REASONS FOR GRANTING OF THE WRIT

I. The Scope of FECA, and Who Determines that Scope, Is An Important, Unsettled Question Under Federal Law About Which The Circuits Have Reached Differing Results.

Three important issues are presented by this petition concerning the scope of FECA. First, does FECA extend to bar claims for non-physical injuries, for which there is no recovery under FECA, or is the FECA bar limited to its express terms under the statute -- to claims for "injury or death"? Second, who determines the proper scope of FECA when a claim not covered by that statute is presented to the courts: the Secretary of Labor or the courts? Third, does FECA apply at all

where the conduct giving rise to the claim is reckless or intentional?

All three questions are important in resolving the rights of federal employees everywhere. There is a substantial disagreement among the circuits on the answers to at least the first two of these questions.

A. Courts can decide questions concerning the scope of FECA where the issue presented is one of the scope of FECA, rather than coverage in and of itself.

Where an actual controversy is properly before a federal court, the court has a "virtually unflagging obligation . . . to exercise the jurisdiction given" it. Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976). The question concerning resolution of issues under FECA arises due to provisions of the statute. FECA, by its terms, restricts judicial review of

claims which have been submitted under FECA:

> The action of the secretary or his designee in allowing or denying a payment under this subchapter is --
>
> . . .
>
> (2) Not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b)(emphasis supplied).

The federal employees in this case have never submitted a claim under FECA, and this is not an action seeking a review of such a claim. The damages they have sustained do not constitute a disabling injury, disease, or death within the scope of FECA. Thus, there is no reason to defer to the Secretary in the consideration of these claims.

Two distinct interpretations of 5 U.S.C. § 8128(b) have arisen in the courts of appeal. Some courts have found that

this provision bars federal courts from exercising jurisdiction over every case where there is a "substantial question" of whether employees' claims are covered by FECA -- i.e., any uncertainty about how the Secretary of Labor might resolve the issue of FECA coverage -- regardless of how the question arose. DiPippa v. United States, 687 F.2d 14, 16 (3rd Cir. 1982). Other circuits, hewing truer to the statute, have permitted a judicial determination of the scope of FECA where the claim is not first submitted to the Secretary and the issue relates to the "scope of coverage" (i.e., whether FECA covers a particular type of injury) as opposed to whether FECA applies to the incident in question (coverage "in and of itself"). Sheehan v. United States, 896 F.2d 1168, 1173, modified 917 F.2d 424 (9th Cir. 1990).

In § 8128(b), Congress simply prohibited courts from second guessing the Secretary of Labor's actual decisions to insure that "the Courts not be burdened by a flood of small claims challenging the merits of compensation decisions . . ." Sheehan, 896 F.2d at 1173. In this case, the claims were never submitted to the Secretary of Labor, and there is no request that a court "review" a determination by the Secretary one way or the other. Instead, the issue presented is whether the Court can determine that the relief sought is in any event beyond the scope of FECA.

Determining whether the employees' claims are within the scope of FECA where they seek relief not provided under FECA is a traditional function of the judiciary, and the federal courts should reach the merits of the claim. In cases

such as this one, where the potential FECA issue is one of scope of coverage rather than the merits of an underlying compensation claim, the question is not whether the Secretary might possibly find the claim covered by FECA. Instead, the court must determine whether a plaintiff's claim is cognizable under FECA. If that claim is not cognizable under FECA, it is not subject to the FECA bar.

This Court should resolve the split in the circuits and find that it is the courts which must decide the scope of FECA's coverage where no claim is submitted to the Secretary. This Court's guidance in this area is particularly prudent in light of the growing class of claims stemming from non-physical injuries. Many of these claims -- including the Petitioners' claims for emotional distress under Guam law -- did

not exist when FECA was enacted. The Secretary of Labor has an inherent incentive to classify non-compensable injuries as covered by FECA, since individuals will then be precluded from suing the United States, even though the United States does not compensate them for their injuries. See DeFord v. Secretary of Labor, 700 F.2d 281, 290 (6th Cir. 1983) (FECA must be given liberal construction to provide compensation but not stretched where unjust).

B. FECA does not extend to claims for emotional distress which are not accompanied by an existing physical injury.

Petitioners' FTCA claims are claims for emotional distress caused by the increased likelihood of contracting cancer and other diseases caused by their exposure to toxic substances. Again, there is a split in the circuits

concerning whether such claims are barred by FECA.

The better reasoned cases, observing that FECA was intended to apply to disabling injuries, hold that FECA was not intended to cover and does not extend to claims for non-disabling emotional injuries, and thus does not bar their assertion under the FTCA. Sheehan, 896 F.2d at 1173; Guidry v. Durkin, 834 F.2d 1465, 1472 (9th Cir. 1987); DeFord v. Secretary of Labor, 700 F.2d 281, 290 (6th Cir. 1983); Underwood v. United States Postal Service, 742 F. Supp. 968, 971 (M.D. Tenn. 1990); Newman v. Legal Services Corp., 628 F. Supp. 535, 543 (D.D.C. 1986); Lawrence v. United States, 631 F. Supp. 631, 636 (E.D. Pa. 1982); Mason v. District of Columbia, 395 A.2d 399 (D.C. 1978).

Other cases hold that FECA does bar all claims for emotional distress arising from the workplace. Swafford v. United States, 998 F.2d 837, 840-41 (10th Cir. 1993); McDaniel v. United States, 970 F.2d 194, 197 (6th Cir. 1992).

This Court should hold that claims for non-disabling emotional distress are not barred by FECA.

C. FECA does not bar claims for injuries which result from reckless or intentional conduct on the part of the United States or its officials.

An important question of Federal law is whether FECA bars claims for injuries which are not the result of workplace "accidents", but instead result from reckless or intentional conduct on the part of federal officials. FECA is the federal government analog to state workers' compensation laws, Lockheed Aircraft Corp., 460 U.S. 190, 193-94

(1983). The scope of workers' compensation provisions is universally restricted to workplace accidents, not intentional or reckless conduct by the employer. See generally, 2A A. Larson Workmen's Compensation Law § 68.00; e.g., Gulden v. Crown Zellerbach Corp., 890 F.2d 195 (9th Cir. 1989) (employee ordered to cleanup PCB spill on hands and knees without protective clothing stated intentional tort against employer, which was not barred by state workers' compensation statute).

FECA should be construed consistently with state workers' compensation statutes, and the compromise imposed by FECA limited to accidental conduct.[10] Under the FTCA,

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[10] If the operator of the Piti Plant had been a private employer, the employees' claims for intentional or recklessly inflicted harm would not be barred under Guam law. Shin Hyon-Su v. Maeda Pacific Corp., No. 87-00063A (D. Guam Appellate

28 U.S.C. 2674, the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." The United States should be held accountable to the same standards as private employers and should not escape responsibility for its reckless or intentional acts.

This Court should construe FECA as not applying to intentional or reckless conduct.

II. The Decision Below That the Individual Respondents Are Entitled to Qualified Immunity Conflicts With Applicable Decisions of This Court.

The Ninth Circuit decision that the Individual Respondents are entitled to qualified immunity conflicts with this Court's decision in Collins v. City of Harker Heights, Texas, 112 S. Ct. 1061 (1992).

Division, June 8, 1988).

The Ninth Circuit found that since the Petitioners were federal employees when the Individual Respondents exposed them to the dangerous condition, that the Individual Respondents were entitled to qualified immunity because they were acting as government employers. However, as this Court held in Collins:

> [T]he employment relationship . . . is not of controlling significance. On the one hand, if the City has pursued a policy of equally deliberate indifference to the safety of pedestrians that resulted in a fatal injury to one who inadvertently stepped into an open manhole, the Court of Appeals' holding would not speak to this situation at all, although it would seem that a claim by such a pedestrian should be analyzed in a similar manner as the claim by this petitioner.

112 S. Ct. at 1065. This Court made it clear that "provisions of the Federal Constitution afford protection to employees who serve the government as well

as those who are served by them." 112 S. Ct. at 1065. Thus, the fact that Petitioners are employees of the federal government does not excuse the Individual Respondents' conduct. Contrary to the Ninth Circuit's decision, Petitioners' constitutional rights are no less than those of citizens who are not employees of the federal government.

CONCLUSION

For the foregoing reasons, this Court should grant a Writ of Certiorari to the Court of Appeals for the Ninth Circuit to review its decision in this case and resolve the questions of whether the Secretary of Labor or the Courts decide the scope of FECA coverage and whether government officers who violate the constitutional right of the federal employees are entitled to a greater qualified immunity than government

officers who violate the constitutional rights of citizens who are not federal employees.

Respectfully submitted,

Bennet A. McConaughy
Counsel of Record
Edward R. Coulson
Joseph E. Delaney
FOSTER PEPPER & SHEFELMAN
1111 Third Avenue,
Suite 3400
Seattle, WA 98101
Telephone: (206) 447-4400
Counsel for Petitioners

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELADIO T. FIGUEROA, et al.,	No. 92-15914
Plaintiffs-Appellees,	D.C. No. CV-91-00030-BJR
v.	
UNITED STATES OF AMERICA, A.D. LOIZEAUX, G.E. MONROE, T.J. JOHNSON, et al.,	OPINION
Defendants-Appellants.	
ELADIO T. FIGUEROA, LEO A. ABILO; BARTOLOME E. ABUAN, ROMEO A. ACEJO, et al.,	
Plaintiffs-Appellants,	No. 92-16602
v.	
UNITED STATES OF AMERICA, et al.,	
Defendants-Appellees.	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM
BARBARA J. ROTHSTEIN, DISTRICT JUDGE, PRESIDING

Argued and Submitted
July 15, 1993-San Francisco, California

A2

Filed October 19, 1993

Before: J. Clifford Wallace, Chief Judge, and Dorothy W. Nelson and Diarmuid F. O'Scannlain, Circuit Judges

Opinion by Judge Nelson; Concurrence by Chief Judge Wallace

SUMMARY

Government Law/Immunity/Civil Litigation and Procedure

The court of appeals reversed a district court judgment in part and remanded in part, holding that government officials were entitled to qualified immunity for ordering employees to clean up a toxic spill without informing them about the potential harm, based on the law as it existed in 1987.

In 1987, an electrical transformer ruptured on the United States Navel Base in Guam, releasing a variety of toxic chemicals. Federal employees sued the United States and 12 individuals who supervised the toxic cleanup. The

plaintiffs' cause of action against the individual defendants alleged a substantive due process claim for tortious conduct. The plaintiffs alleged that the defendants were negligent in ordering the plaintiffs to clean up the chemicals and return to work without advising them about appropriate protective measures, and in not providing proper medical care immediately following the explosion.

The government moved to dismiss all claims against it, arguing that they were preempted by the Federal Employees Compensation Act (FECA). The individual defendants moved for dismissal of the constitutional tort claim on the ground of qualified immunity. The district court dismissed the claims against the government, holding that the FECA coverage question should be resolved by the Secretary of Labor. The court denied the

individual defendants' motion. All parties appealed.

[1] The general rule is that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary. [2] FECA also contemplates coverage for a condition of emotional distress that results from the stress of being exposed in a discrete event to a toxic substance that could cause future physical harm. As a result of their exposure to the toxic chemicals, and after suffering some medical problems, the plaintiffs were concerned about developing cancer. [3] The district court properly dismissed the plaintiffs' FTCA claims.

[4] In order to proceed in their suit against the individual defendants, the plaintiffs must have alleged a violation of a right that was clearly established in 1987 at the time of the

accident. [5] In 1987, a right not to be placed in danger by a government actor was contingent upon that actor first depriving an individual of his liberty. [6] It could not be concluded that in 1987 it was clearly established that a government employer's order to an employee to perform a dangerous task, without informing the employee about the potential harm of which the employee was ignorant, constituted a deprivation of liberty for purposes of the due process clause. [7] Defendants were entitled to a defense of qualified immunity as a matter of law.

Wallace, C.J., concurred to write that he disagreed with the majority's characterization of the law in 1987.

COUNSEL

Edward R. Coulson, Bennet A. McConaughy, Joseph E. Delaney, Foster Pepper & Shefelman, Seattle, Washington,

for the plaintiffs-appellants/plaintiffs-appellees.

Stuart M. Gerson, Assistant Attorney General, Fredrick A. Black, United States Attorney, Barbara L. Herwig, Richard Montague, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendants-appellants.

Stuart M. Gerson, Assistant Attorney General, Fredrick A. Black, United States Attorney, J. Patrick Glynn, Director, Joann J. Bordeaux, Deputy Director, Paul M. Honigberg, Judith N. Macaluso, Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for defendant-appellant United States.

OPINION

D.W. NELSON, Circuit Judge:

In May of 1987, an electrical transformer ruptured at the Piti Power Plant on the United States Naval Base in

Guam, releasing a variety of toxic chemicals. Subsequently, 251 federal employees who were at the plant at the time of the accident filed suit against the United States and twelve individuals who supervised the toxic spill clean-up. Plaintiffs brought five causes of action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 ("FTCA"). Their Sixth cause of action was directed at the individual Defendants and alleged a substantive due process claim for tortious conduct. All Plaintiffs' claims stemmed from their allegations that Defendants were negligent or grossly negligent: 1) in ordering Plaintiffs to clean-up the polychlorinated biphenyls chemicals and to return to work without advising them about appropriate protective measures or securing the area; and 2) in not providing proper medical

care immediately after the explosion. Plaintiffs sought damages for current and potential future physical injuries and for emotional distress resulting from their fear that they would develop cancer at some future date.

The government moved to dismiss all claims against it on the ground that these claims were preempted by the Federal Employees Compensation Act, 5 U.S.C. § 8101 *et. seq.* ("FECA"). The individual Defendants moved for dismissal of the constitutional tort claim on the ground of qualified immunity. The district court granted the government's motion based on its judgment that the FECA coverage question should be resolved by the Secretary of Labor ("Secretary"). The district court denied the individual Defendants' motion. All parties timely appeal.

DISCUSSION

I. FECA Preemption

Under FECA, federal employees are compensated for injuries sustained during the performance of their duties. The remedies provided under FECA are exclusive of all other remedies against the United States for job-related injury or death. 5 U.S.C. § 8116(c).

There are two sorts of FECA coverage questions. The first question is whether FECA covers a particular *type* of injury. This is a question of "the scope of coverage." *Sheehan v. United States*, 896 F.2d 1168, 1174 (9th Cir.), *modified*, 917 F.2d 424 (9th Cir. 1990). The second question is whether a plaintiff is entitled to compensation under the *facts* of a particular event. This question requires a determination of such facts as "'whether the injury . . . occurred while

the employee was on the job.'" *Id.* (quoting *Griffin v. United States*, 703 F.2d 321, 322 (8th Cir. 1983). This is a question of "coverage in and of itself." *Id.* (internal quotations omitted).

In this case, the district court dismissed Plaintiffs' FTCA claim on the ground that there was a question of FECA preemption concerning Plaintiffs' alleged injuries which should be resolved by the Secretary of Labor. Plaintiffs' appeal from this dismissal, arguing that under *Sheehan* this is a question of scope of coverage and the district court was therefore required to resolve the question itself. Defendant counters that this case is more akin to *Reep v. United States*, 557 F.2d 204 (9th Cir. 1977), under which the district court correctly deferred the question of coverage to the Secretary. *Id.* at 207-208.

[1] *Sheehan* held that when there is a question about the scope of FECA coverage, this question should be resolved by the district court and *Reep's* instruction to defer coverage questions to the Secretary "does not apply." 896 F.2d at 1174 (internal quotations omitted). Rather, *Reep* only applies when there are questions about whether a particular factual circumstance falls under FECA. *Id.* In *Sheehan*, however, the plaintiff's claim was not colorable under FECA as a matter of law. *Sheehan's* holding regarding who should resolve an FECA scope of coverage question rested upon this court's judgment that the alleged emotional distress was "divorced from any claim of physical harm." *Id.* Thus *Sheehan* stands only for the proposition that when a plaintiff has failed to allege a colorable claim under FECA as a matter

of law, the district court should render a judgment. We do not read *Sheehan* as altering the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary. *See Reep*, 557 F.2d at 207.

[2] In this instance, Plaintiffs' claims are colorably under FECA. Plaintiffs' alleged mental distress injuries are tied to physical harm, both potential and actual. As a result of their exposure to the PCBs, and after suffering some medical problems, Plaintiffs are concerned about developing cancer. Under FECA, an occupational disease or illness includes:

> a condition produced in the work environment over a period longer than a single work day . . . by such factors as . . . continued or repeated stress or strain; or exposure to hazardous elements such as, but not limited to, toxins, poisons, fumes . . . or

> repeated conditions . . . of the work environment.

20 C.F.R. § 10.5(a)(16). FECA thus contemplates coverage for a condition produced over a long period of time by "stress" or as a result of being exposed to a "toxic" substance that may cause future harm. Arguably, mental distress is a form of stress. It takes only a small step to conclude that FECA also contemplates coverage for a condition of emotional distress that *results from* the stress of being exposed in a *discrete* event to a toxic substance that could cause future physical harm.

[3] Moreover, the Department of Labor has determined that emotional distress may be considered a disability when it arises "from [a worker's] emotional reaction to . . . a requirement imposed by the employment." *In re Lillian*

Cutler & Dept. of Labor, 28 Dig. & Dec. Empl. Comp. App. Bd. 125 (1979); *Castro v. United States*, 757 F. Supp. 1149, 1151 (W.D. Wash. 1991) (observing that FECA covered emotional distress claims that arose from a "reaction to . . . regular or specifically assigned work duties"); *Burke v. United States*, 644 F. Supp. 566, 568 (E.D. La. 1986) (discussing Assistant Administrator of Labor's official affirmative response to whether *job-related* mental distress fell under FECA) (emphasis supplied). Accordingly, the district court properly dismissed plaintiffs' FTCA claims in order to allow the Secretary to resolve the question of whether or not the claims are covered by FECA.

II. **Qualified Immunity**

Ordinarily, the denial of a 12(b)(6) motion is not a reviewable final order, it

is only when a question of immunity is involved that we use the collateral order doctrine to exercise jurisdiction. We review the district court's denial of a 12(b)(6) motion *de novo*. *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 725 (9th Cir. 1992). We assume the truth of the complaint's well-pleaded factual allegations and construe them in the light most favorable to the plaintiff. *Oscar v. University Students Coop. Ass'n, 965 F.2d 783, 785 (9th Cir.)*, cert. denied, 113 S. Ct. 655 (1992). A 12(b)(6) motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The twelve individual Defendants argue that the district court erred in

denying their motion to dismiss since the Plaintiffs' constitutional claim is not cognizable under the due process clause. In the alternative, Defendants argue that they are entitled to qualified immunity. We need only deal with the latter challenge.

[4] "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In order to proceed in their suit against the individual Defendants, Plaintiffs must have alleged a violation of a right that was clearly established in 1987 at the time of the accident. *Siegert v. Gilley*, 111 S. Ct.

1789, 1793 (1991); *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). In addition, the contours of that right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

[5] Defendants argue that Plaintiffs' substantive due process claim is essentially a claim that they were deprived of a safe workplace. Plaintiffs counter that they are alleging a violation of their more general liberty interest not to be placed in a position of danger by government actors. Thus, we must decide whether to characterize Plaintiffs' claim as alleging acts of commission or omission. This is a difficult question. The line between the two types of conduct can easily become blurred. *See, e.g, White v. Rochford*, 592 F.2d 381, 384

(7th Cir. 1979) (it is a "tenuous metaphysical construct which differentiates sins of omission and commission"). Nevertheless, we think a line can be drawn. Plaintiffs claim that they were exposed to a danger *as a result* of Defendants' actions in ordering them to clean-up after the explosion and thus that Defendants played more than a passive role. *See, e.g., Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982); we agree with the district court that these are allegations of affirmative conduct. However, the district court failed to consider that in 1987 a right not to be placed in danger by a government actor was contingent upon that actor first depriving an individual of his liberty.

In determining whether Plaintiffs had a clearly established right in 1987 not to be placed in danger by a government

employer, we "survey the legal landscape" as it existed in 1987, *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). We begin by looking at those cases that are "most like" the instant case. *Id.* at 592. However, the exact situation need not have been the subject of a prior case. Rather, if there are cases establishing a clear constitutional right, the question for this court is whether those cases are meaningfully distinguishable from the instant case. *Id.* at 591-93. In the "absence of binding precedent," we look to all available decisional law. *See Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985). This "includes cases from state courts, other circuits and district courts." *Wood*, 879 F.2d at 591. If there is no law that is binding for this circuit and there are few cases on point, "an

additional factor that may be considered in ascertaining whether the law is clearly established is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as the non-binding authorities at that time." *Id.* at 593 (internal quotations omitted).

A. *Walker and McClary*

The case most factually similar to this one is from the Seventh Circuit. In *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986), several state prisoners attacked and killed three guards and injured several others. Some of the injured guards and the estates of the three deceased guards brought suit claiming that prison officials had deprived them of their right to a safe working environment by *affirmatively* "act[ing]" to "*increase[ ]* the danger"

faced by the guards. *Id.* at 509 (emphasis supplied). We observe that the district court failed to consider *Walker* because it wrongly considered it to be a case that dealt with acts of omission.

Although the Seventh Circuit recognized that in some situations a government actor had a duty not to engage in acts or omissions which placed an individual in a position of danger, *id.* at 511, the court dismissed the guards' claims. The decision turned upon the fact that the creation of danger did not result from a *governmental* curtailment of the guards' freedom to act on their own behalf. *Id.* at 510-11. The guards had not been "dragoon[ed]" or "forced" into their jobs. *Id.* While employers do compel their employees to some degree, there was no *governmental* compulsion such as when a "state imprisons a person" or

"[w]hen the state arrests the adult having custody of a child," that forced the guards to face dangers that most people would choose to avert. *Id.* at 511. Accordingly, in 1986 the Seventh Circuit recognized that there was a due process right not to be exposed to danger when a governmental restriction on an individual's freedom had created the *initial* danger and *then* the government had done nothing to help the individual. This right was based on the maxim that "[t]he state must protect those it throws into snake pits." *Id.* at 511. Conversely, the Seventh Circuit did not recognize a substantive due process right when the government had created or "increased" the danger faced by an individual but had done nothing to restrict the individual's

freedom to avert that danger. *Id.* at 509-10.[1]

The Second Circuit engaged in a similar analysis in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), which concerned the death of a state employee as a result of a work-related accident. The deceased plaintiff's estate brought a substantive due process claim against plaintiff's supervisor, alleging that he had intentionally failed to follow the safety procedures that would have averted the accident. *Id.* at 84-85. The Second

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[1] As Plaintiffs point out, to some extent *Walker* relies upon cases which refused to find a substantive due process right when the plaintiffs alleged only that a government actor had refused to *interfere* to prevent danger, rather than affirmatively acting to create or increase an individual's danger. *Id.* at 510. The *Walker* court, however, conceded that in the case before it the prison officials *had* acted to increase the danger to its employee guards. Thus, this was not a case which turns on the distinction between acts of commission or omission.

Circuit affirmed the dismissal of the claim, stressing that there was no allegation that the deceased had been in the state's control at the time of his death.[2] *Id.* at 88-89.

Accordingly, during the relevant time period, the law was more complex than either party or the district court acknowledges. On the one hand, there was no clearly established general constitutional right not to be exposed to danger by a government actor irrespective of whether that exposure was cast in terms of an act of *commission or omission*. On the other hand, there *was* a clearly established right not to be exposed to

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[2] The district court refused to consider *McClary* on the ground that it was a procedural rather than a substantive due process case. As Defendants point out, however, *McClary* involved both a procedural and a substantive due process claim relating to a workplace injury (Blue at 25 n. 7).

danger if a government actor had first taken some action to restrain a person's liberty. In 1987, the question of whether a defendant had engaged in affirmative conduct went to the issue of restraint. If such a restraint had occurred, however, it did not matter whether the resulting danger occurred due to a failure to act or to a purposeful action. *See Bowers*, 686 F.2d at 618 ("[i]f the state puts a man in a position of danger . . . and *then fails* to protect him, it will not be heard to say that its role was merely passive") (emphasis supplied).

B. *Precedential Effect of Walker and McClary*

Although *Walker*, and to a lesser extent *McClary*, are factually similar to the present case, neither decision is binding authority in this circuit. Thus we must address whether there is any

indication that in 1987 this circuit or the Supreme Court would have disagreed with the Seventh and Second circuits and found that a government official had a clearly established duty not to expose an individual to danger, irrespective of whether or not the government actor had restrained that individual's liberty.

The district court relied upon three cases to support its judgment that the Defendants were not entitled to qualified immunity[3] The district court relied upon our decision in *Wood*, 879 F.2d at 583, which is considered to be the beginning of "danger creation" cases in this circuit. *See Grubbs*, 974 F.2d at 121. *Wood*, in turn, followed the Seventh Circuit

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[3] The third case relied upon by the district court, *Ward v. City of San Jose*, 737 F. Supp. 1502 (N.D. Cal. 1990), has since been reversed on this issue. *Ward v. City of San Jose*, 967 F.2d 280 (9th Cir. 1991).

decision in *White*, 592 F.2d at 381, the second case relied upon by the district court. Neither *Wood* nor *White*, however, demonstrates that there was a clearly established right in 1987 not to be exposed to danger by a government actor without some initial governmental restriction upon a person's liberty.

In *White*, the police arrested a gentleman on the freeway and abandoned his young niece and two nephews in the car which was left on the freeway. *Id.* at 382. The Seventh Circuit held that the children had a due process liberty right not to have been stranded. *Id.* at 383-85. Rather, the police should have brought the children to a safe location. *Id.* *White* stands for the proposition that "[w]hen the *state arrests* the adult having custody of a child, the state had better take care

of the child." *Walker*, 791 F.2d at 511 (emphasis supplied).

In *Wood*, the plaintiff was a passenger in a car that had been pulled over by the police at 2:30 a.m. The police arrested the driver, impounded the car, instructed the passenger to leave the car, and then refused to give her a ride out of the area. She was later raped by a third party. 879 F.2d at 586. Also faced with a qualified immunity defense, *Wood* concluded that in 1984 the Ninth Circuit would have followed *White*, *id.* at 594, and that by 1984 "passengers of arrested drivers" had a clearly established substantive due process right not to be "abandon[ed]" by police officers and thereby exposed to danger. *Id.* at 593.

In addition to *White*, *Wood* also stated that, in 1984, this court mostly likely would have embraced the "logic" of

two other relevant Seventh Circuit decisions: *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983); *cert. denied*, 465 U.S. 1049 (1984), and *Bowers*, 686 F.2d at 616. *Wood*, 879 F.2d at 594. In *Bowers*, the deceased plaintiff's estate alleged that the state mental health department had "recklessly" exposed the public to danger by releasing a violent mental patient who then killed deceased. 686 F.2d at 617. In *Jackson*, a police officer failed to come to the aid of a car crash victim who later died. 715 F.2d at 1201-04. In both cases, the Seventh Circuit refused to find a substantive due process right, notwithstanding that in *Bowers* the allegation could easily be characterized as an exposure to danger claim.

Wood read *Bowers* and *Jackson* as requiring that a due process exposure to

danger claim must allege some restraint on an individual's or a relevant third-party's liberty, which creates a special relationship between the individual and the government officer that then triggers the defendant's duty to protect the individual from any potential harm. *Wood*, 879 F.2d at 993-94. *Wood* distinguished *White* from *Jackson* and *Bowers* on the ground that in *White* "the arrest created the danger" to the three children. *Id.* at 594 (quoting *Jackson*, 715 F.2d at 1204). The critical difference between *Bowers*, *Jackson* and *White* was that in *White* a deprivation of liberty had created the danger. This restriction upon the children's liberty triggered the state's duty to protect them. *Id.*; *Jackson*, 715 F.2d at 1204. In contrast, in *Jackson* and *Bowers*, the state had done nothing to interfere with the individual's liberty

and thus any danger that presented itself to the plaintiff as a result of the state's action or inaction did not implicate due process.

In sum, none of the cases relied upon by the district court demonstrate that in 1987 there was a clearly established right in this circuit, or in any other circuit, not to be placed in a position of danger by a government actor absent some limitation on a person's ability to act on his own behalf to avert harm. Rather, by 1986 a person had a clearly established right not to be exposed to danger by a government actor *as a result* of his restricting an individual's or a relevant third party's liberty to act on his own behalf.

C. *Deprivation of Liberty*

Plaintiffs are aware that absent an allegation that a government actor

deprived them of their liberty, in 1987 there was no clearly established right not to be placed in a position of danger by their government employer. Plaintiffs contend that their liberty was deprived because Defendants "forced" them to clean up the toxic spill, while at the same time deliberately keeping them in a state of ignorance about the potential danger they faced. Plaintiffs contend that in 1987 this sort of conduct fell under the definition of "deprivation of liberty" because it prevented them from acting on their own behalf to avoid potential harm.

The cases from the relevant time period suggest that the courts were indeed broadening the definition of "deprivation of liberty" for exposure to danger claims. On one end of the spectrum were those cases that involved a restraint on an individual's liberty as a result of a

custodial relationship. *See, e.g., Estate of Gilmore v. Buckley*, 787 F.2d 714, 721 (1st Cir.) (discussing custodial cases), *cert. denied*, 479 U.S. 882 (1986). On the other end of the spectrum were those cases where a government defendant had only indirectly restrained an individual's freedom. *See, e.g., White*, 592 F.2d at 384-85; *Ward*, 737 F. Supp. at 1509-10. By 1986, many courts employed the short-hand phrase "special relationship" to describe the nexus between a government actor's possible and varied types of control over an individual's liberty that would trigger a duty not to throw that individual into a situation of danger. *Estate of Gilmore*, 787 F.2d at 722; *Walker*, 791 F.2d at 511. "Generally speaking, all of these cases [stood] . . . for the proposition" that a "special relationship" is created when "the state, by exercising custody or

control over the plaintiff, effectively strips her of her capacity to defend herself, *or* affirmatively places her in a position of danger." *Estate of Gilmore*, 787 F.2d at 721-22 (emphasis supplied). Other courts defined a "special relationship" as a situation where there was a pre-existing custodial relationship and distinguished this from a situation where an individual's exposure to danger was a result of his liberty being restricted in some noncustodial manner. *See, e.g., Ward*, 737 F. Supp. at 1510. In 1987, however, all these various types of deprivation of liberty shared a common attribute: deprivation of liberty denoted some sort of *governmentally* sanctioned

interference with a person's *physical* liberty.[4]

[6] Therefore, after surveying the legal landscape, we cannot conclude that in 1987 it was clearly established that a government employer's order to an employee to perform a dangerous task, without informing the employee about the potential harm of which the employee was ignorant, constituted a deprivation of liberty for purposes of the due process clause. *See, e.g., Walker*, 791 F.2d at 510; *McClary*, 786 F.2d at 89 (deliberate exposure of public employees to high risk does not violate the constitution when exposure

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[4] We explicitly make no holding whether in 1987 there was a right not to be exposed to danger as a result of a government actor restricting an individual's civic liberties. *See, e.g., Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1065-66 (1992); *Walker*, 791 F.2d at 510 (in 1986 a public employee could not be threatened with a loss of his job as a result of speaking out on matters of "public concern").

does not stem from an abuse of governmental power and when "identical actions could have been carried out by a private employer"). Rather, the only clear definition of deprivation of liberty that is found in the cases is an act, direct or indirect, of governmental interference with a person's bodily liberty.

[7] While we acknowledge that a broader understanding of deprivation of liberty may have emerged later, *see, e.g., Grubbs*, 974 F.2d at 121, we hold that in 1987 there was no *clearly established* constitutional right not to be placed in a position of danger by a government employer absent some sort of governmental restriction on an individual's physical freedom to act to avert potential harm. Defendants are thus entitled to a defense of qualified immunity as a matter of law.

Conclusion

We affirm the district court's dismissal of Plaintiffs' FTCA claims against the United States. We reverse the district court's judgment that the individual Defendants are not entitled to qualified immunity and remand this motion for judgment in accord with this opinion. AFFIRMED in part, REMANDED in part.

WALLACE, Chief Judge, concurring:

I concur in part I of the opinion and in the result reached in part II. I write separately to emphasize two points.

First, as the majority correctly holds in part II.C., as of 1987, Figueroa did not have a clearly established right to be free from danger, unless a government official took some affirmative action to interfere with his physical liberty. *Walker v. Rowe*, 791 F.2d 507, 510-11 (7th Cir.), *cert. denied*, 479 U.S.

994 (1986); *McClary v. O'Hare*, 786 F.2d 83, 88-89 (2d Cir. 1986); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). In this case, the government did not restrain or otherwise interfere with the physical liberty of Figueroa or any other member of the plaintiff class. That is sufficient to decide the issue. The majority's attempt to draw a line between acts of omission and acts of commission is unnecessary to the resolution of this case and should be regarded as dicta.

Second, I disagree with the majority's characterization of the state of the law in 1987. The cases cited by the majority do not create a clearly established right "not be to be exposed to danger if a government actor had first taken some action to restrain a person's liberty." Maj. op. at 11833. Instead, these cases establish a right to be free

from danger *created by* the action of a government official that interferes with a person's physical liberty. That is an important distinction. Because our task in reviewing a qualified immunity defense is to describe accurately the state of the law, not to extend it, I cannot agree with the majority's subtle change.

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

ELADIO T. FIGUEROA, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	)	Civil Action No. 91-00030 ORDER STAYING PROCEEDINGS

THIS MATTER comes before the court on the United States' motion to dismiss on grounds of collateral estoppel, on plaintiffs' motion to stay the proceedings and for certification for interlocutory appeal, on the individual defendants' motion to stay the proceedings pending appeal, and on the United States' motion to strike plaintiffs' response regarding unexhausted administrative claims.

I. FACTUAL BACKGROUND

The United States Department of the Navy operates the Piti Power Plant in Guam. On May 26, 1987, at 3:22 p.m., a transformer at the Piti Power Plant exploded and sprayed approximately 60 gallons of polychlorinated biphenals, commonly referred to as PCBs, throughout the plant.

On April 23, 1991, 1230 individually named plaintiffs filed suit against the United States and twelve individuals in their official capacity for actions arising out of the spill. Two hundred fifty-two of the plaintiffs were federal employees at the time of the accident. In their complaint, plaintiffs stated causes of action against the United States for negligence in the clean-up of the PCBs as well as for negligence in evaluating the damage and advising plant workers about

protective measures. Plaintiffs also brought causes of action against the United States based on strict liability, knowing, wanton and willful conduct and the Guam Toxic Substance Exposure Compensation Act ("TSECA"). Finally, plaintiffs state a constitutional tort claim, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), against various individual naval officers and doctors.

In a related action, Abuan v. General Electric Co., No. 89-00031 (D. Guam), a certified class of federal employee plaintiffs, including many of the same plaintiffs in this action, filed suit against manufacturers General Electric Co. and Monsanto alleging negligence and violation of TSECA.

In a December 19, 1991, order, this court denied the individual defendants' motion to dismiss on the grounds of

failure to state a claim, qualified immunity and inadequate factual pleadings. In a January 17, 1992, order, this court granted the United States' motion to dismiss various claims against them, including: (1) the claims of the 252 federal employee plaintiffs on the grounds they are preempted by the Federal Employees Compensation Act ("FECA"); (2) claims based on TSECA; (3) claims for prejudgment interest and attorneys fees; and (4) plaintiffs' claims based on ultrahazardous activity or strict liability.[1] In its motion to dismiss, the United States also asked this court to dismiss as plaintiffs those individuals

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[1] In the January 17, 1992, order, the court further held that the law governing the liability of the parties would be the law of Guam, prior to the passage of TSECA, on exposure to toxic substances. Finally, the court denied the government's motion to dismiss plaintiffs' request for medical monitoring expenses.

who filed administrative claims as "spouse of" or "child of" a power plant worker on the grounds that these persons failed to exhaust administrative remedies. The court denied that part of the government's motion and directed them to produce within 30 days a list of those individual plaintiffs that it believes have not exhausted administrative remedies. Plaintiffs were then to explain, within 30 days of receiving the names, why they contend these individuals have exhausted administrative remedies. The United States filed its list on February 18, 1992, and the plaintiffs filed their response on May 14, 1992.

In a February 25, 1992, decision in Abuan, Judge Munson granted the defendants' motions for summary judgment, finding that the federal employee plaintiffs failed to proffer sufficient

evidence of exposure or causation to maintain their action and that plaintiffs' admitted lack of physical injuries prevented them from stating claims for relief under Guam common law. Abuan, et al. v. General Electric Co., et al., No. 89-00031, Decision and Order Re Defendants' Motion for Summary Judgment.

In an April 13, 1992, order this court denied the individual defendants' motion for reconsideration and granted in part plaintiffs' motion for reconsideration, amending this court's January 17, 1992, order to state that only plaintiffs' TSECA claim based on increased likelihood of injury would have to be dismissed for lack of subject matter jurisdiction on the grounds that it impermissibly imposes liability without fault.

The United States now moves for summary judgment on the claims of the non-federal employee plaintiffs on the grounds that those claims are precluded under the doctrine of collateral estoppel by Judge Munson's decision in Abuan. The United States also seeks dismissal of the claims of the 307 non-federal-employee plaintiffs who the government alleges failed to file administrative claims. Finally, the United States moves to strike plaintiffs' response regarding these plaintiffs' failure to exhaust administrative remedies.

Plaintiffs move for a stay of these proceedings and for certification for interlocutory appeal that part of this court's January 17 order dismissing the federal employee plaintiffs' claims on the grounds that those claims are pre-empted by plaintiffs' remedies under FECA. The

individual defendants also move for a stay of these proceedings pending appeal to the Ninth Circuit Court of Appeals of this court's December 19, 1991, order denying their motion to dismiss based on qualified immunity.

II. DISCUSSION

A. Individual Defendants' Motion to Stay

On May 22, 1992, the individual defendants filed a notice of appeal of this court's December 19, 1991, order denying their motion to dismiss based on qualified immunity, and this court's April 13, 1992, order denying reconsideration. As qualified immunity is designed to relieve a government official from the burdens of litigation and is not merely a defense, an interlocutory appeal of an order denying dismissal based on qualified immunity is an appeal of right.

Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). Unless the district court certifies that an appeal would be frivolous, such an appeal divests the district court of jurisdiction over the claim. See United States v. Claiborne, 727 F.2d 842, 850 (9th Cir.), cert. denied, 469 U.S. 829 (1984); Chuman v. Wright, No. 92-55007, slip op. at 1 (9th Cir. March 27, 1992).

Defendants' appeal of this court's order denying dismissal based on qualified immunity is not frivolous. The individual defendants presented substantial questions to this court that the court resolved in plaintiffs' favor. Accordingly, this court will not certify the appeal as frivolous and the individual defendants are entitled to a stay of all proceedings against them pending appeal.

B. Plaintiffs' Motion for a Stay and for Certification

Under Fed. R. Civ. P. 54(b), this court may direct the entry of a final, and therefore appealable, judgment on fewer than all claims when: (1) the case involves multiple parties or claims; (2) the court has disposed of one, but less than all, of a parties' claims; and (3) there is no just reason for delay. Plaintiffs move for entry of judgment under Rule 54(b) of that part of this court's January 17, 1992, order dismissing the federal employee plaintiffs' claims on the grounds that they are precluded by FECA. Plaintiffs also ask the court to stay the remaining proceedings pending appeal.

Defendants do not oppose certification of this issue for interlocutory appeal. The United States,

however, does request that the court resolve its motion for summary judgment of dismissal of the claims of the non-federal-employee plaintiffs' claims prior to staying the proceedings.

The court finds that its order dismissing the federal employee plaintiffs claims on the grounds that their sole remedy is provided by FECA is appropriate for certification for interlocutory appeal. The January 17 order completely disposed of the federal employee plaintiffs claims against the United States and left only the claims of the non-federal employee plaintiffs and of all plaintiffs against the individual defendants. In addition, immediate appeal on this issue would advance the ultimate resolution of the litigation. As long as the proceedings will be stayed to permit the Ninth Circuit to address the

individual defendants' appeal on qualified immunity, there is no just reason to delay the appeals' court's hearing plaintiffs' appeal.

C. United States' Motions for Summary Judgment and to Strike

Although the government has requested that the court rule on its pending motions for summary judgment of dismissal of the non-federal-employee plaintiffs' claims prior to staying these proceedings, the court will hold those motions in abeyance until it lifts its stay. The United States bases its motion for summary judgment on Judge Munson's decision in Abuan. A notice of appeal of that decision already has been filed. As long as these proceedings will not be moving forward in any other way, the court believes that the wisest use of judicial resources would be to permit the Ninth

Circuit to address Judge Munson's ruling prior to its considering the government's motion. If Judge Munson's ruling is reversed on appeal, the motion will become moot. If Judge Munson's ruling is affirmed, the court can immediately consider the United States' motion.

Finally, although there are no appellate court rulings to be made on the United States' motion to dismiss the claims of the non-federal-employee plaintiffs who they allege failed to file administrative claims, the briefs submitted by the parties indicate that there remain considerable differences between the parties regarding the administrative claim process. The court believes that holding this motion in abeyance during the stay will give the parties additional opportunity to address the issue and perhaps resolve on their own

whether particular putative plaintiffs actually submitted administrative claims. As plaintiffs have failed to explain their nearly two-month delay in filing their response regarding these plaintiffs' administrative claims, the court believes that they will give particular attention to resolving this issue.

III. CONCLUSION

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) the individual defendants' motion for a stay of the proceedings against them pending appeal of this court's order denying their motion to dismiss on qualified immunity grounds is GRANTED;

(2) plaintiffs' motion for a stay and for certification for interlocutory appeal of this court's January 17, 1992,

ruling dismissing the federal employee plaintiffs' claims against the United States on the grounds that they are precluded by FECA is GRANTED; and

(3) all future proceedings in this matter, including the United States' motions for summary judgment and to strike plaintiffs' response regarding plaintiffs who failed to file administrative claims, are STAYED pending the appeals discussed above.

DATED at Seattle, Washington this 29th day of May, 1992.

/s/
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

ELADIO T. FIGUEROA, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 91-00030
v.	)	
	)	ORDER RE:
UNITED STATES OF AMERICA, et al.,	)	MOTIONS FOR RECONSIDERATION
Defendants.	)	

THIS MATTER comes before the court on the individual defendants' motion for reconsideration of this court's December 19, 1991, order denying dismissal of plaintiffs' claims and on plaintiffs' motion for reconsideration of portions of this court's January 12, 1992, order dismissing plaintiffs' claims against the United States.

I. FACTUAL BACKGROUND

The United States Department of the Navy operates the Piti Power Plant in Guam. On May 26, 1987, at 3:22 p.m., a transformer at the Piti Power Plant exploded and sprayed approximately 60 gallons of polychlorinated biphenals, commonly referred to as PCBs, throughout the plant.

On April 23, 1991, 1230 individually named plaintiffs filed suit against the United States and twelve individuals in their official capacity for actions arising out of the spill. Two hundred fifty-two of the plaintiffs were federal employees at the time of the accident. Jurisdiction of plaintiffs' complaint is based on the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), 2671-80. In their complaint, plaintiffs state causes of action against the United States for negligence in the clean-up of the PCBs

as well as for negligence in evaluating the damage and advising plant workers about protective measures. Plaintiffs also bring causes of action against the United States based on strict liability, knowing, wanton and willful conduct and the Guam Toxic Substance Exposure Compensation Act ("TSECA"). Finally, plaintiffs sixth cause of action is a constitutional tort claim, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), against various naval officers and doctors. Plaintiffs seek to recover damages for their current and future injuries from exposure to toxic substances and for their increased fear of developing cancer at some time in the future as a result of this exposure.

In a December 19, 1991, order, this court denied the individual defendants' motion to dismiss on the grounds of

failure to state a claim, qualified immunity and inadequate factual pleadings. In a January 17, 1992, order, this court granted the United States' motion to dismiss various claims against them, including: (1) the claims of the 252 federal employee plaintiffs on the grounds they are preempted by the Federal Employees Compensation Act ("FECA"); (2) claims based on TSECA; (3) claims for prejudgment interest and attorneys fees; and (4) plaintiffs' claims based on ultrahazardous activity or strict liability.[1]

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[1]In its motion, the United States also asked this court to dismiss as plaintiffs those individuals who filed administrative claims as "spouse of" or "child of" a power plant worker on the grounds that these persons failed to exhaust administrative remedies. The court denied that part of the government's motion and directed them to produce within 30 days a list of those individual plaintiffs that it believes have not exhausted administrative remedies. Plaintiffs were then to explain, within

The individual defendants now move for reconsideration of this court's December 19, 1991, order. Plaintiffs move for reconsideration of portions of this court's January 17, 1992, order.

II. DISCUSSION

A motion for reconsideration is properly granted only if it raises arguments that were not addressed in the original motion. Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir. 1989), cert. denied, 110 S.Ct. 192 (1989). See also

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30 days of receiving the names, why they contend these individuals have exhausted administrative remedies.

In the January 17, 1992, order, the court further held that the law governing the liability of the parties would be the law of Guam, prior to the passage of TSECA, on exposure to toxic substances. Finally, the court denied the government's motion to dismiss plaintiffs' request for medical monitoring expenses.

Backland v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985).

A. Individual Defendants Motion for Reconsideration.

In its December 19, 1991, order, this court held that plaintiffs' Fifth Amendment Substantive Due Process cause of action adequately asserts violation of a protected constitutional right, i.e., the right not to be placed in a position of known danger by government officials, and held that the individual defendants' were not entitled to qualified immunity.

Defendants now ask the court to reconsider these holdings. They argue that this court was incorrect when it concluded that the individual defendants' decisions to require the power plant employees to return to work implicated any established constitutional right. They also argue that this court's resolution of

the qualified immunity issue was incorrect. Finally, the individual defendants raise a new argument, that plaintiffs' constitutional tort claim is precluded by the exclusive remedies of FECA.

1. Asserted Constitutional Right

In its December 19, 1991, order this court held that plaintiffs' allegation that the individual defendants intentionally placed plaintiffs in a position of known danger adequately stated a claim for violation of a protected Fifth Amendment substantive due process right. See Order Denying Individual Defendants' Motion to Dismiss at 4-8. The court explained that while there is no substantive due process violation where a government official has no duty to intercede to prevent a harm he knew about but did not create, substantive due

process is violated where the government official has affirmatively acted to place an individual in danger. Id. at 6.

Defendants argue first that this court erred in finding such a right in an environmental harm case. Defendants next argue that this court erred because plaintiffs have no constitutional right to a safe work environment. Collins v. City of Harker Heights, 60 U.S.L.W. 4182 (February 26, 1992); Walker v. Rowe, 791 F.2d 507, 510 (7th Cir.), cert. denied 479 U.S. 994 (1986).[2]

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[2]Defendants also argue that this court placed too much reliance on the plaintiffs' allegation that they were provided with inadequate protective gear when they were directed to return to work. Defendants point out that the GAO report states that the appropriate personal protective equipment overalls were not in the naval supply system. Defendants argue that where resources necessary to comply with clearly established constitutional law are not available, qualified immunity shields the individual defendants from liability. See Youngberg v. Romero, 457 U.S. 307, 323

Defendants' arguments are unpersuasive. The court considered and rejected defendants' first argument in its original order. Order Denying Individual Defendants' Motion to Dismiss at 4-8 ("The governmental action in the environmental harm cases differs from the governmental action that plaintiffs assert violated their rights in this case"). Plaintiffs do not assert a constitutional right to be free from environmental harm or from exposure to toxic chemicals, and the facts of their complaint need not be interpreted in such a restrictive manner.

Defendants' second argument fails to take into account the distinctions made by

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(1982). Defendants' reliance on Youngberg is misplaced. Youngberg deals with the resources available to directors and administrators of state institutions, including mental hospitals, and instructs courts to treat with deference the decisions of administrators regarding use of resources. Id. at 322-23.

this court regarding the necessary action by a government official before plaintiffs can assert a constitutional violation. As the Supreme Court recently made clear in Collins, a city's failure to train or warn its employees about known hazards in the workplace does not violate the due process clause. Collins, 60 U.S.L.W. at 4186. In Collins, the plaintiff asserted that the city of Harker Heights, Texas, deprived her husband of his life and liberty because it failed to provide a reasonably safe work environment. However, the court in Collins drew a distinction between its case, where the deceased's job of cleaning the sewer system required him to face inherent risks, and cases where the government has an affirmative duty of care.

Other cases cited by the individual defendants where courts have rejected a

constitutional claim based on the right to a safe work environment similarly have distinguished the situation where the government has affirmatively acted to place a person in danger. See, e.g., Walker, 791 F.2d at 511 ("The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten"); Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986). See also Ruge v. City of Bellevue, 892 F.2d 738 (8th Cir. 1989) ("where the states abuses its governmental authority through an alleged policy of actively placing a person into a situation of known danger, the Constitution proscribes and limits such action").[3]

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[3]The Supreme Court's decision in Collins effectively overrules Ruge, which had held that plaintiff asserted a 42 U.S.C. § 1983 claim for municipal liability where

In addition, although the court in Walker held that where a state employee voluntarily accepts a job, the state has no duty to provide a safe working environment, the incident at issue here involves more than plaintiffs' regular working conditions. As the court explained in its December 19, 1991, order, the explosion at the power plant was a discrete, identifiable event releasing toxic chemicals into the plant. Plaintiffs allege that defendants knew about this danger and still directed them

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it alleged that the city had a policy of not shoring up ditches into which it sent its employees. Ruge is distinguishable from the situation at issue here. The policy of not shoring up ditches was a latent unsafe working condition. Here, however, the explosion was a discrete event. While the municipal employees in Ruge knew they would be working in ditches, the employees here did not accept their positions with any forewarning or anticipation that they would be instructed to work in a dangerous situation following an explosion.

to return to work. Such an allegation adequately asserts a substantive due process claim. The individual defendants' arguments to the contrary are again unpersuasive.

2. Qualified Immunity

"Government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 818 (1982). Government officials are presumed to have knowledge of clearly established law and to be able to act reasonably with respect to that law. A determination of whether the qualified immunity doctrine applies in a particular case focuses on two inquiries:

(1) whether the constitutional rights

allegedly violated were clearly established at the time of defendants' conduct; and (2) whether defendants' conduct was objectively reasonable with reference to the clearly established law.

The operation of these standards interacts with the level of generality at which plaintiffs' constitutional right is identified. Anderson v. Creighton, et al., 483 U.S. 635, 639 (1987). Under Anderson, the constitutional right asserted by plaintiffs must be sufficiently specific to permit reasonable government officers to understand that their actions may violate that right. Id. at 640.

In its December 19, 1991, order, this court held that the right not to be placed in known danger by government officials was well established in 1987 and that the court could not conclude at this stage of

the proceedings that plaintiffs could prove no set of facts that would establish that the individual defendants' actions were not objectively reasonable. In reaching its decision that plaintiffs' asserted constitutional right was well established, the court relied primarily on cases such as Ward v. City of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986), cert. denied, 483 U.S. 1020 (1987); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 111 S.Ct. 341 (1990); White v. Rochford, 592 F.2d 381 (7th Cir. 1979), where government officials had taken affirmative action that placed plaintiffs in a position of known danger.

Defendants argue that the court erred in two respects. First, the individual defendants argue that plaintiffs' asserted constitutional right was not clearly established at the time of the 1987

explosion. Second, the individual defendants argue that the court impermissibly substituted its own view of reasonableness for the objective reasonableness standard required in a qualified immunity determination.

a. Clearly Established Law

Defendants argue, as they did in their motion to dismiss, that plaintiffs are attempting to state their constitutional right in an overbroad manner, contrary to the admonition in Anderson. Defendants argue that plaintiffs' complaint, looked at with the specificity required in Anderson, asserts that plaintiffs' constitutional rights to be free from environmental harm and to be safe and secure in their workplace have been violated.

In support of this argument, defendants again point to cases where

courts have held that there is no constitutional right to be free from exposure to harmful chemicals. See, e.g., In re "Agent Orange" Product Liability Litigation, 475 F. Supp. 928, 934 (E.D.N.Y. 1979). Defendants also, however, point to the line of cases holding that there is no constitutional right to freedom from governmental indifference to occupational safety. See, e.g., Collins v. Harker Heights, 60 U.S.L.W. 4182 (February 26, 1992); Walker v. Rowe, 791 F.2d 507, 510 (7th Cir.), cert. denied, 479 U.S. 994 (1986).

As discussed above, the court has again concluded that plaintiffs have asserted a substantive due process right. In determining whether that right was firmly established in 1987, at the time of the power plant explosion, the court is to look at all available decisional law.

See, e.g., Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988). Of the cases advanced by the parties, In re "Agent Orange" Product Liability Litigation (1979); Walker (1986); Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986); Rankin v. City of Wichita Falls, 762 F.2d 444 (5th Cir. 1985); Ward (1986); and White were decided prior to the explosion at issue here. White and Ward both hold that government officials violate substantive due process when they knowingly place individuals in positions of known danger. In re "Agent Orange" holds that there is no constitutional right to freedom from exposure to environmental harm. Walker, Washington and Rankin all hold that there is no

constitutional right to a safe work environment.[4]

Defendants argue that confronted with these cases, a reasonable official would conclude that he is bound either by the In re Agent Orange line of cases finding or by the Walker line of cases and would therefore not understand that he was violating a constitutional right by requiring the plaintiffs' to return to work and by providing them with inadequate safety equipment. Defendants also argue that even if this court determines that the right not to by [sic] placed in known danger by government officials was firmly

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[4]Defendants cite a fourth case, McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986) for the proposition that there is no constitutional right to a safe work environment. McClary, however, is inapposite. It involves a procedural due process claim based on officials' failure to comply with municipal and state safety regulations in the daily operation of its highways.

established, the facts of this case are too different from the facts of White and Ward for the unlawfulness of the individual defendants' actions to have been apparent.

Defendants are correct in their assertion that it was clearly established in 1987 that there was no constitutional right either to be free from environmental harm or to have a safe work environment. However, the facts of these lines of cases are too dissimilar from the facts of this case to be the clearly established law for determining whether the individual defendants are entitled to immunity from suit. Both the environmental harm and safe work environment claims involve actions based on existing conditions and do not involve affirmative government action. Walker involved allegations of a municipal policy of failing to shore up

ditches, a known dangerous working condition. Washington involved an attack by a prisoner on a prison guard and allegations of unsafe conditions at the jail allowing the prisoner access to the guard. Rankin involved the death by drowning of a municipal worker at a water treatment plant when the worker attempted to help a co-worker who had slipped. In none of these cases did a governmental actor take affirmative steps to place the individuals in a position of known danger, as did the individual defendants in White, Ward and, allegedly, this case.

That the government officials here were not law enforcement officers as they were in White and Ward does not mean that plaintiffs' asserted constitutional right is too broadly asserted. Nor does defendants' reliance on F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989)

persuade this court that these plaintiffs have phrased their constitutional right too broadly. In Trotter, the plaintiffs asserted a substantive due process violation based on government officials' use of fabricated data to prepare an advisory document. The Ninth Circuit held that, although there were some cases finding substantive due process violations in irrational zoning decisions, because no case had specifically held that preparation of an advisory report using fabricated data was a substantive due process violation, the law finding such a constitutional right was not clearly established.

This court finds Trotter unpersuasive in this situation for two reasons. First, the Ninth Circuit opinion in Trotter would seem to suggest that the facts of a case be identical to those in a prior decision

before the asserted constitutional right would be clearly established. This is not what Anderson requires, and to the extent defendants rely on Trotter for this proposition, the court rejects such an interpretation. Under Anderson,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official actor is protected by qualified immunity unless the very action in question previously has been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640. Second, the plaintiffs in Trotter phrased their constitutional right very narrowly, asserting a right not to have the government deliberately use false data in an advisory opinion to deprive them of their property rights. Without any attempt to phrase this asserted right in

terms of a broader, well recognized right, it is little wonder that the Ninth Circuit would require practically an identical set of facts before finding that such a right was clearly established. Plaintiffs here, however, clearly link the affirmative action of the government officials to similar affirmative action by government officials in other cases. In addition, as the court pointed out in its prior order, both Ward and White anticipate that they will not be restricted to law enforcement situations.

Thus, the court concludes again that plaintiffs' asserted constitutional right was clearly established at the time of the 1987 explosion. Case law existed at that time finding violation of substantive due process rights where government officials deliberately placed individuals in a position of known danger. While the cases

cited by defendants finding that there is no constitutional right to a safe work environment may have been dispositive had workers been on duty at the time of the explosion and sued the individual defendants for failing to prevent the conditions that lead to the explosion, those cases are unavailing here. These plaintiffs do not allege failure to maintain a safe work environment. Rather they allege that the individual defendants violated their constitutional rights when they required them to return to work after the explosion.

b. Objective Reasonableness

Even if the court again finds that plaintiffs' asserted constitutional right was clearly established, defendants argue that the court erred in finding that the individual defendants did not act objectively reasonably in light of

existing law at the time. Specifically, defendants refer to the Supreme Court's decision in Hunter v. Bryant, 112 S.Ct. 534 (1991) issued three days before this court's December 19, 1991, order stating that the district court is to look at the conduct of the governmental officers in the circumstances at the time of their actions, not whether another reasonable, or more reasonable interpretation can be constructed five years after the fact. Hunter v. Bryant, 112 S.Ct. 534, 537 (1991). Defendants argue that, in light of Hunter, this court applied the wrong reasonableness test. Defendants argue that in stating "in light of this known danger [the presence of toxic chemicals in the plant], it simply cannot be reasonable for government officials to choose continued power generation over the safety of the power plant employees," this court

substituted its own notion of reasonable official conduct for the objective reasonableness called for under Hunter. See Order Denying Individual Defendants' Motion to Dismiss at 13. In addition, defendants argue that this court impermissibily used the "known danger" criteria to determine what was reasonable.

The court, evidently too abruptly, used "known danger" as a shorthand way of describing the conditions that the individual defendants faced as they made their decision to continue operating the Piti Power Plant following the May 26, 1987, explosion. Extremely toxic chemicals were housed at the power plant. The transformer explosion sprayed approximately 60 gallons of polychlorinated biphenals, commonly referred to as PCBs, throughout the plant. The extent of the release of toxic

chemicals was not immediately known. However, it is common knowledge that exposure to toxic chemicals can have severe health effects. In addition, the individual defendants' decision to provide some protective equipment, regardless of whether it was adequate, indicates that they were aware that the explosion posed some danger to plant employees.

It is against this background that the court decided whether, examining the evidence in the light most favorable to the plaintiff, plaintiffs could prove any set of facts that would entitle them to relief. In other words, the court determined that plaintiffs could show a set of facts from which it could conclude that the objective reasonableness of the individual defendants' actions could not be established as a matter of law.

Finally, defendants are incorrect when they state that the court substituted its own notion of reasonableness for the objective reasonableness inquiry. In Hunter, the Ninth Circuit held that, at the summary judgment stage, the objective reasonableness of the police officer's actions in determining that they had probable cause to arrest the plaintiff was a question for the trier of fact, and a grant of summary judgment was not appropriate unless there was only one reasonable conclusion a jury could reach. Bryant v. United States Treasury Department, Secret Service, 903 F.2d 717 (9th Cir. 1990). The Supreme Court held that the Ninth Circuit's statement of law was wrong because it did not examine the reasonableness of the officers' actions at the time but rather asked whether another reasonable or more reasonable construction

of events could be found five years later. Hunter, 112 S.Ct. at 537.

In denying that the individual defendants are entitled to qualified immunity, this court does not ask whether another reasonable or more reasonable course of action was possible in the wake of the power plant explosion. Rather, this court merely concludes that plaintiffs have set forth sufficient facts to raise a question as to whether the individual defendants' conduct was objectively reasonable.

As they have not persuaded the court that its earlier decision was in error, the individual defendants' motion for reconsideration of denial of the qualified immunity defense is denied.

3. Inadequacy of Pleadings

In cases where violation of a constitutional right includes an element

of the government officials' subjective intent, the heightened pleading standard requires plaintiffs to state in their complaint nonconclusory allegations setting forth evidence of unlawful intent. Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991). In its December 19, 1991, order, this court stated that in their original complaint plaintiffs did little more than describe the time and place of the allegedly unconstitutional conduct and the identity of the allegedly responsible officials.[5] The complaint did

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[5]Ordinarily, all that is required of a plaintiffs in their complaint is that they allege specific conduct violating their rights, the time and place of the conduct and the identity of the responsible officials. Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988), cert. denied, 490 U.S. 1065 (1989). Plaintiffs argue that as subjective intent is not an element of the substantive due process violation at issue here, they have sufficiently plead their cause of action. As the court has determined that defendants set forth no new arguments on this issue in

not link any specific individual to any specific conduct. The court ruled that plaintiffs would have until March 31, 1992, to amend their complaint with more specific facts linking the individual defendants with the alleged violation of plaintiffs' constitutional rights.[6]

Defendants argue that it was error for this court to recognize the proper pleading standard and then permit plaintiffs to conduct discovery and amend their complaint rather than to dismiss the complaint. Defendants further argue that by allowing such discovery, the court emasculates the purpose of the qualified

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their motion for reconsideration, the court need not consider plaintiffs' arguments.

[6]Upon stipulation of the parties, this date was extended pending the court's ruling on the individual defendants' motion for reconsideration.

immunity defense, which is to include immunity from discovery.

Defendants' arguments are again unpersuasive. First, this court fully considered defendants' arguments regarding the propriety of dismissal in making its original ruling and need not revisit these arguments on reconsideration. Second, whereas qualified immunity does include immunity from discovery, the court denied the individual defendants' motion for qualified immunity.

4. Preclusive Effect of FECA on Bivens Claim

Defendants next present an issue that was not raised at all in their individual motion to dismiss. Defendants argue that this Bivens action is precluded by the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193, which Congress intended to make the exclusive

remedy against the United States for job-related injuries.

Where there are special factors counseling hesitation, federal courts should not invoke their remedial powers to create a Bivens action for unconstitutional official conduct. See Bush v. Lucas, 462 U.S. 367 (1983). One such special factor is the existence of a comprehensive statutory scheme providing exclusive remedies for the allegedly unconstitutional government conduct giving rise to the Bivens action. Id. at 368 (Civil Service Reform Act); Schweiker v. Chilicky, 487 U.S. 412, 428-29 (1988) (Social Security Act); Sky Ad, Inc. v. McClure, No. 90-56021, slip op. at 6 (9th Cir. Dec. 24, 1991).

Defendants argue that because FECA is "intended to provide an exclusive remedy for all employees of the United States

suffering job-related injuries. . . ," Guidry v. Durkin, 834 F.2d 1465, 1471 (9th Cir. 1987), this court should not allow a Bivens action based on injuries suffered by these plaintiffs in connection with their employment at the power plant.

Defendants' argument is again unpersuasive. The court notes first that even if it were to hold that FECA does not preclude a Bivens action, such a ruling would only affect the federal employee plaintiffs, not their spouses or other family members. See Order Granting in Part the United States' Motion to Dismiss at 5. Second, defendants' argument is incomplete. While FECA clearly precludes actions against the United States for job-related injuries, it is not clear that FECA precludes actions against individual government officials for allegedly deliberate constitutional violations. As

plaintiffs point out, to give FECA preclusive effect in such a situation would, in essence, allow government officials to act with impunity toward the employees they supervise.

Finally, the cases cited by defendants where courts held that other statutory schemes should preclude a Bivens action are distinguishable from this one. In Schweiker and Sky Ad, Inc., plaintiffs pursued Bivens actions based on procedural due process violations. The courts held that the statutory schemes involved were designed specifically to deal with review of administrative decisions, thereby precluding a separate legal action based on that process. Similarly, in Bush, the Supreme Court held that the Civil Service Reform Act precluded a Bivens action arising out of personnel decisions because the Act provided a comprehensive and

complete remedial scheme for all personnel decisions. In his concurrence, Justice Marshall specifically stated that "there is nothing in today's decision to foreclose a federal employee from pursuing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." Bush, 462 U.S. at 391.

Accordingly, the individual defendants' motion for dismissal based on the preclusive effects of FECA is denied.

B. Plaintiffs' Motion for Reconsideration

Plaintiffs seek reconsideration of only that part of this court's January 17, 1992, order, dismissing plaintiffs' claims based on the Guam Toxic Substances Exposure Compensation Act ("TSECA").

In its January 17, 1992, order, this court dismissed plaintiffs' TSECA action,

finding that TSECA was hostile to the interests of the United States and that to borrow such a hostile statute as the state law for application under the FTCA violated constitutional supremacy clause principles. This court stated that the applicable rule of decision would instead be borrowed from existing Guam common law. The court also found that even if TSECA's application would not violate supremacy clause principles, plaintiffs' TSECA action would nonetheless have to be dismissed on the grounds: (1) that TSECA exceeded the FTCA's waiver of sovereign immunity because TSECA's provisions establishing presumptions for injury and causation essentially impose liability without fault; and (2) that this court lacked subject matter jurisdiction because TSECA does not require a showing of injury and causation, as required under the FTCA.

As a fundamental principle of judicial restraint, courts avoid reaching constitutional questions unless necessary. See, e.g., Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988). Upon reconsideration, the court determines that its examination of the constitutionality of TSECA was premature. In a proceeding parallel to this one, plaintiffs bringing suit against General Electric Company and Monsanto Company for their role in the power plant explosion were unable to establish that they were exposed to a level of toxic substances sufficient to warrant future medical monitoring or to place themselves at an increased risk of future injury, illness or disease, even under the presumptions set out by TSECA. See Abuan v. General Electric Co., Civil Action No. 89-00031, Decision and Order Re

Defendants' Motions for Summary Judgment, February 25, 1992, at 4, 10. As a result, the court in Abuan granted defendants' motion for summary judgment and declined to rule on the various constitutional challenges to TSECA.

As illustrated by Abuan, in the discovery proceedings the parties will produce considerable information regarding the level of toxic substances at which the power plant employees were exposed. Such information will be produced regardless of whether plaintiffs are pursuing their FTCA action by applying TSECA or by applying the common law of Guam. If, as in Abuan, the plaintiffs are unable to show a sufficient level of exposure, the court need not ever consider whether TSECA violates constitutional supremacy clause principles. Under principles of judicial

restraint it should not do so at this stage.[7]

Accordingly, the court will vacate that portion of its January 17, 1992, article dismissing plaintiffs' TSECA claim and strike the United States' motion to dismiss the TSECA claim as premature. The government may renew its motion to dismiss the TSECA claim following sufficient discovery to determine the levels at which plaintiffs have been exposed to toxic chemicals.

III. CONCLUSION

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[7]For the same reasons that the court need not address the constitutionality of TSECA at this point, the court will defer ruling on the government's motion to dismiss plaintiffs' TSECA claim on the grounds of lack of subject matter jurisdiction and on the grounds that the TSECA essentially imposes strict liability, which is beyond the scope of the waiver of sovereign immunity in the FTCA.

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) the individual defendants' motion for reconsideration of this court's December 19, 1991, order denying their motion to dismiss is DENIED;

(2) plaintiffs' motion for reconsideration of this court's January 17, 1992, order granting in part the United States' motion to dismiss is GRANTED; and

(3) that part of this court's January 17, 1992, order stating that plaintiffs' TSECA claim would have to be dismissed is VACATED; and

(4) the government's motion to dismiss plaintiffs' TSECA claim is STRICKEN with leave to renew.

DATED at Seattle, Washington this 13th day of April, 1992.

/s/
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

ELADIO T. FIGUEROA, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 91-00030
v.	)	
UNITED STATES OF AMERICA, et al.,	)	ORDER GRANTING IN PART THE UNITED STATES' MOTION TO DISMISS
Defendants.	)	

THIS MATTER comes before the court on the United States' motion to dismiss all claims against it. Having reviewed the matter, together with all documents filed in support and in opposition, having heard oral argument and being fully informed, the court finds and rules as follows:

I. FACTUAL BACKGROUND

The United States Department of the Navy operates the Piti Power Plant in

Guam. On May 26, 1987, at 3:22 p.m., a transformer at the Pita Power Plant exploded and sprayed approximately 60 gallons of polychlorinated biphenals, commonly referred to as PCBs, throughout the plant.

On April 23, 1991, 1230 individually named plaintiffs filed suit [sic] the against the United States and twelve individuals in their official capacity for actions arising out of the spill. Two hundred fifty-two of the plaintiffs were federal employees at the time of the accident. Jurisdiction of plaintiffs' complaint is based on the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), 2671-80. In their complaint, plaintiffs state causes of action alleging negligence in the clean-up of the PCBs as well as negligence in evaluating the damage and advising plant workers about protective

measures. Plaintiffs also bring causes of action based on strict liability, knowing, wanton and willful conduct and the Guam Toxic Substance Exposure Compensation Act ("TSECA"). Plaintiffs seek to recover damages for their current and future injuries from exposure to toxic substances and for their increased fear of developing cancer at some time in the future as a result of this exposure.

The government now moves for dismissal of all claims against it on the grounds that: (1) the claims of the 252 federal employee plaintiffs are precluded by the Federal Employees Compensation Act ("FECA"); (2) the claims of some plaintiffs must be dismissed for failure to exhaust administrative remedies; (3) plaintiffs cannot proceed under the Guam Toxic Substance Exposure Compensation Act because it is

impermissibily hostile to federal supremacy principles; (4) the FTCA does not permit awards of prejudgement interest or attorneys fees; (5) the FTCA precludes plaintiffs' strict liability claim; and (6) the claims for medical monitoring must be dismissed because the FTCA does not authorize equitable relief. The court heard oral argument on these issues on November 12, 1991.

II. DISCUSSION

A. Standard of Review

Under Fed. R. Civ. P. 12(b)(6), a complaint should not be dismissed unless it appears beyond doubt that the plaintiffs can prove no set of facts that would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45, 47-48 (1957); California Dump Truck Owners Ass'n v. Associated Gen. Contractors, 562 F.2d 607,

614 (9th Cir. 1977). Even if dismissal is appropriate, plaintiffs should still have the opportunity to amend their complaint when it appears that a more carefully drafted complaint might state a claim upon which relief could be granted. Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985); see also Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962).

The court notes initially that the issues addressed by the government in their motion to dismiss present few factual issues. Rather, they contend primarily that the causes of action brought by plaintiffs are not permissible under the FTCA.

B. Exclusivity of Federal Employees Remedy Under FECA

Under FECA, 5 U.S.C. § 8101, et seq., federal employees are compensated for injuries sustained during the performance

of their duties. 5 U.S.C. § 8102. The remedies provided to federal employees under FECA are exclusive of all other remedies against the United States with respect to a job-related injury or death of a federal employee. 5 U.S.C. § 8116(c); Johansen v. United States, 343 U.S. 427, 435-37 (1952); Sheehan v. United States, 896 F.2d 1168, 1173, modified, 917 F.2d 424 (9th Cir. 1990). In essence, a federal employee exchanges the ability to file a subsequent lawsuit for the promise of prompt payment of specified amounts. Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-94 (1983).

The kinds of injuries compensated for under FECA are set out in the statute and a wide body of regulations. For example, a work-related injury is defined as including, in addition to injury by

accident, "a disease proximately caused by the employment." 5 U.S.C. § 8101(5). An occupational disease or illness includes:

> a condition produced in the work environment over a period longer than a single work day or work shift by such factors as systemic infection; continued or repeated stress or strain; or exposure to hazardous elements such as, but not limited to, toxins, poisons, . . . or repeated conditions or factors of the work environment.

20 C.F.R. § 10.5(a)(16). The touchstone for determining coverage under FECA is whether the injury is job-related. Reep v. United States, 557 F.2d 204 (9th Cir. 1977).

To ensure uniformity of interpretation, the Secretary of Labor is vested with the authority to determine whether an injury or illness is covered by FECA. See Gunston v. United States, 358 F.2d 303 (9th Cir. 1966), cert. denied, 384 U.S. 993 (1966). The

Secretary's decisions are not reviewable by the courts. 5 U.S.C. § 8128(b). In an FTCA action by a federal employee, the district court's only initial determination is whether there is a "substantial question" of FECA coverage. Reep, 557 F.2d at 207. If so, the court must dismiss the action in favor of a ruling by the Secretary of Labor. A substantial question of FECA coverage exists unless it is certain that the Secretary would find no coverage. DiPippa v. United States, 687 F.2d 14, 16 (3d Cir. 1982).

The government contends that the FTCA claims of all federal employee plaintiffs must be dismissed because the alleged injuries occurred on the job and a substantial question of FECA coverage exists with respect to plaintiffs' claims for emotional distress and future medical

injuries from exposure to the toxic chemicals released in the explosion. Plaintiffs, on the other hand, contend that there is no substantial question of FECA coverage for their claims for emotional distress, exposure that has not resulted in present injury, and increased future risk of disease. Plaintiffs also argue that this court, not the Secretary of Labor, should make the determination here whether FECA applies because the government has already stated that some of the injuries sustained by plaintiffs are not compensable. See Plaintiffs' Opposition to Motion to Dismiss at 18, citing Memorandum in Support of United States' Motion to Dismiss at 6.

The court agrees with the government and concludes that the claims presented by the federal employee plaintiffs present a substantial question of FECA coverage.

First, and most importantly, the federal employee plaintiffs' injuries, both present and future, are clearly job-related. They arise unquestionably out of the explosion and release of PCBs at the Piti Power Plant where these plaintiffs were employed. Second, some emotional injuries, even absent physical harm, are covered by FECA. Castro v. United States, 757 F. Supp. 1149 (W.D. Wash. 1991).[1] Courts that have determined that FECA did not apply to claims of emotional distress

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[1]Plaintiffs suggest that this court should differentiate between negligent infliction of emotional distress claims and intentional infliction of emotional distress claims. They further suggest that there is no substantial question of coverage for intentional infliction of emotional distress claims. The court in Metz v. United States, 723 F. Supp. 1133, 1132 (D. Md. 1989), however, considered precisely this question and determined that because Mr. Metz' claimed injury was job-related, FECA coverage did apply to plaintiff's intentional infliction of emotional distress claim.

have done so only where the claims were not somehow related to the performance of occupational duties or to some potential for physical harm. See Sheehan v. United States, 896 F.2d 1168, 1174 (9th Cir. 1990) (no substantial question of FECA coverage on plaintiff's claim for emotional distress resulting from sexual harassment); Metz v. United States, 723 F. Supp. 1133, 1136 (D.Md. 1989). The federal employee plaintiffs' emotional distress claims here are both job-related and based on exposure to a toxic substance. The emotional distress claim is precisely the result of the potential physical injury.

Third, plaintiffs cannot split their claims and seek to place their claims for future physical injury or increased risk of future physical injury outside the scope of FECA coverage simply because the

physical injury has not yet manifested itself and is unlikely to do so until well after the three-year period for presenting FECA claims expires. Section 8122(b) of FECA specifically contemplates coverage of disabilities that do not manifest themselves until well after the event that produced the injury. Section 8122(b) also specifies that the three-year period for filing FECA claims does not begin to run until the employee becomes aware or should have become aware that his disability is job-related. Furthermore, to permit plaintiffs to recover for some presently manifested injuries under FECA now and pursue an FTCA action for injuries that will not manifest themselves until some time in the future would effectively eviscerate the exclusivity provisions of FECA. FECA is the exclusive remedy for

all job-related injuries, regardless of when they manifest themselves.

Finally, the court emphasizes that it is coverage, not compensation, that determines whether FECA applies. Griffin v. United States, 703 F.2d 321 (8th Cir. 1983). The Secretary of Labor would be well within his statutory authority to determine that although a particular kind of injury is covered by FECA's provisions because the injury is job-related, the injury is not compensable. Accordingly, the court will dismiss the federal employee plaintiffs' claims.

C. Exhaustion of Administrative Remedies

Prior to filing suit against the government under the FTCA, plaintiffs must exhaust administrative remedies by presenting a claim to the relevant agency. 28 U.S.C. § 2675(a); Avery v. United States, 680 F.2d 608, 609 (9th Cir. 1982).

A claim is presented to an agency when the agency is given minimal written notice. Adams v. United States, 615 F.2d 284 (5th Cir.), on rehearing, 622 F.2d 197 (5th Cir. 1980). Administrative remedies are exhausted when the agency denies the claim or has failed to act upon it for six months. 28 U.S.C. 2675a.

The government argues that 333 plaintiffs have not properly filed administrative claims. Plaintiffs argue that the claims were indeed made, but that there have been many name changes. Plaintiffs further argue that the majority of the 333 plaintiffs identified by the government were family members of persons exposed to PCBs from the power plant explosion who filed administrative claims as "spouse of" or "child of" a power plant employee. Plaintiffs conclude that this

was sufficient minimal notice for purposes of exhausting administrative remedies.

It is the court's understanding that a system was set up whereby all claimants filed one of two items in presenting their claims to the Navy: (1) an "Authorization to Bring Claims" authorizing plaintiffs' counsel to make a claim on their behalf; or (2) a PCB claim form. Not all plaintiffs filed the PCB claim form. In most cases, a single claim form was submitted with several authorizations attached to it. The Navy summarily denied these claims without objecting to the form of the claim.

In Avery, adopting the standard of the Fifth Circuit, the Ninth Circuit held that all that was required for minimal notice was sufficient written notice to permit the agency to bring an investigation into the claim. Avery,

680 F.2d at 609. The Avery court concluded that even a skeletal claim form setting forth only the bare elements of notice of accident and injury was sufficient. Id.

The claims forms submitted by plaintiffs as "spouse of" or "child of" were sufficient notice to the Navy to begin an investigation. The claims identified the person who had been exposed to the toxic chemicals and the particular plaintiff's relationship to that person. The effort required on the part of the Navy to discover the actual name of that plaintiff would have been minimal. In addition, as the Navy denied the claims without objecting to the form of notice, the court will not now permit the government to raise such an objection. The government's motion to dismiss the causes of action for those plaintiffs who

filed administrative claims as "spouse of" or "child of" for failure to exhaust administrative remedies will be denied.

Finally, the court notes that there is some question whether some of the 333 plaintiffs addressed in this part of the government's motion filed administrative claims at all. The government is to produce within thirty days from the date of this order the names of all plaintiffs who did not file an administrative claim. Plaintiffs will then have thirty days to submit proof that these particular plaintiffs did file an administrative claim within the parameters of this ruling.

D. The Guam Toxic Substance Exposure Compensation Act

The FTCA states that the government is to be held liable under the statute "in the same manner and to the same extent as

a private individual under like circumstances." 28 U.S.C. § 2674. For purposes of determining liability then, the FTCA "borrows" the substantive law of the jurisdiction in which suit is brought. See Moor v. County of Alameda, 411 U.S. 693, 701, 701 n. 11 (1973); Richards v. United States, 369 U.S. 1, 7-8 (1962); Feres v. United States, 340 U.S. 135, 142 (1950).

Plaintiffs bring a cause of action under the Guam Toxic Substance Exposure Compensation Act ("TESCA") as the state substantive law pursuant to which the government's liability is to be determined. TSECA, which was enacted in May of 1990,[2] provides that a claimant can recover not only for present injury, but

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[2]TSECA applies to all claims not reduced to final judgment as of TSECA's effective date. 10 Guam Code Ann. § 41105.

also for "increased risk of illness or injury" without having to prove any present injury. 10 Guam Code Ann. § 41104(2). Once a plaintiff shows exposure to a toxic substance beyond federally permitted levels, TSECA places the burden of disproving such increased risk of illness or injury on the defendant. 10 Guam Code Ann. § 41104(5)(a). TSECA further provides that all doubts are to be resolved in favor of the exposed person and that "studies indicating harmful effects of exposure on animals shall create a presumption that exposure of humans will also be harmful and will cause similar results." 10 Guam Code Ann. § 41104(5)(b), (c). In addition, prior to passage of TSECA, the Guam Legislature appropriated $900,000 for an "Employees Recovery Fund" designed, among other

things, to assist power plant employees and their families in retaining counsel to secure compensation and other remedies "from the United States and its agents and from the manufacturers and suppliers of the transformer." Public Law 20-22.

The government argues that plaintiffs' TSECA claim must be dismissed for lack of subject-matter jurisdiction because TSECA may not be used as the "borrowing" statute for purposes of jurisdiction under the FRCA. The government argues that TSECA is hostile to the United States and impermissibly infringes on Supremacy Clause principles. Plaintiffs respond that TSECA is not impermissibly hostile to the government because it is a law of general applicability and does not single out the United States for liability. Plaintiffs specifically point to the fact that the

Governor of Guam initially vetoed TSECA because he felt it subjected Guam to unlimited potential liability. Plaintiffs' Opposition to Motion to Dismiss at 35.

Plaintiffs arguments are unpersuasive. Where state law is hostile to federal interests, Supremacy Clause principles dictate that only those portions of the law that are not hostile to the United States can be applied to the United States. See United Stats [sic] v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973); North Dakota v. United States, 460 U.S. 300 (1983). In both of these cases, when faced with a choice between federal law and state law that was hostile to federal interests, the Supreme Court rejected the state law.

Although TSECA may not on it face restrict liability to the United States,

its historical and legislative context make clear that it was passed directly in response to the incident involved in this case. See United Steelworkers v. Weber, 443 U.S. 193, 201 (1979) (statute should be read against background of legislative history of its enactment and historical context). First, TSECA was passed after the power plant explosion but made applicable to all claims that had not yet been reduced to final judgment, which allowed this claim to be brought under TSECA.

Second, TSECA imposes liability for precisely the kinds of harms allegedly sustained by residents of Guam from exposure to the toxic chemicals released in the Piti Power Plant explosion and assigns burdens of proof to defendants in areas where it would be difficult for

plaintiffs to meet those burdens.[3] For example, TSECA permits the plaintiffs merely to show exposure to toxic chemicals above certain federally permitted levels and then shifts the burden of disproving an increased likelihood of disease to the defendant. This use of federal regulatory levels to shift the burden of proof is inappropriate. The government sets regulatory levels with a margin of error to protect the health of the general population, Johnston v. United States, 597 F. Supp. 393-94, 424-26, not to establish causation in an individual case. Furthermore, because TSECA provides a cause of action for increased risk of disease in addition to present, actual

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[3]These novel provisions of TSECA also essentially impose liability without a showing of injury or causation and, as discussed below, would warrant dismissal of plaintiffs' TSECA claims because strict liability is not permitted under the FTCA.

injury, it would be virtually impossible for the government to rebut the presumption of causation created by plaintiffs' showing exposure beyond the federal regulatory levels.

TSECA also states that studies indicating the harmful effects of exposure on animals will create a presumption that similar exposure to human beings will result in similar harmful effects. Use of such animal studies to show causation in human beings has been rejected by federal courts. Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307, 313-14 (5th Cir.1989); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 830-31 (D.C. Cir. 1988).

Third, TESCA was passed shortly after the Guam Legislature appropriated $900,000 for, among other things, retention of counsel to pursue claims against the

United States based on injuries sustained in the explosion. The Guam Legislature clearly had a strong incentive- recouping these appropriate funds--to pass legislation that would make it easier for plaintiffs to recover from the United States. Accordingly, the court will dismiss plaintiffs' TSECA claims and will not borrow from TSECA to access FTCA liability.

Ordinarily, in cases where the federal government argues that a particular state law is hostile to federal interests, the government urges a court to apply federal law instead. However, there is no federal substantive law for FTCA cases for the parties to proceed under in place of TSECA. Thus, the parties again will have to look to Guam, only this time to its common law, to provide the substantive law for decision in this case.

E. Prejudgment Interest and Attorneys Fees

Paragraph four of plaintiffs' prayer for relief seeks "interest, attorney fees and costs of suit." The government argues that plaintiffs are not entitled to either prejudgment interest or attorneys fees under the FTCA.

The government is correct with respect to both interest and attorneys fees. The FTCA specifically precludes an award of prejudgment interest. 28 U.S.C. § 2674. The FTCA also states that attorneys may recover up to a twenty-five percent contingent fee but does not specifically authorize an attorney fee in addition to whatever is awarded through judgment. In addition, the court is persuaded by the Eleventh Circuit's finding that because Congress viewed FTCA claims as typically involving contingent

fee arrangements, it specified a percentage that attorneys could claim from an award rather than permitting attorneys to claim a fee on top of the award. Joe v. United States, 772 F.2d 1535, 1137 (11th Circuit 1985).

F. Ultrahazardous Activity, Strict Liability

In their third cause of action, plaintiffs set forth a claim based on strict liability and allege that defendants "engaged in an ultrahazardous activity by continuing to use PCB transformers at the Piti Power Plant," thereby making them strictly liable for all injury, loss and damage resulting from this ultrahazardous activity.

The government argues that this court must dismiss plaintiffs' third cause of action for lack of jurisdiction because the United States, through the FTCA, has

not waived sovereign immunity for strict liability claims. The government also argues that TSECA in essence imposes strict liability because of the way it shifts burdens of proof from plaintiffs to defendants.

Again, the government is correct in its assessment of the limits of plaintiffs' claims under the FTCA. The United States may be sued in tort only to the extent that Congress has waived sovereign immunity. United States v. Orleans, 425 U.S. 807, 814 (1976). The Supreme Court has consistently disallowed claims under the FTCA based on any type of liability without fault. Laird v. Nels, 406 U.S. 797, 803 (1972); Dalehite v. United States, 346 U.S. 15, 44-45 (1953). Accordingly, plaintiffs' third cause of action will be dismissed for lack of subject-matter jurisdiction.

The court also finds that even if supremacy clause principles did not preclude application of TSECA, the Guam statute impermissibly imposes liability without fault. As discussed above, under TSECA, the burden of proof shifts to defendants once plaintiffs show exposure to PCBs above federally permitted levels. The statute also resolves all doubts in favor of plaintiffs and permits studies showing the harmful effects of exposure on animals to create a presumption that similar exposure would create like harmful effects in people. These provisions would impose liability after plaintiffs had done little more than show exposure above a certain level. They require no showing of causation or injury. Furthermore, as plaintiffs have repeatedly stated that they have no presently manifested injury,

they cannot prove any set of facts that would entitle them to relief.

As jurisdiction in an FTCA action depends upon a showing of injury and causation and TSECA requires none, plaintiffs' TSECA claims also would be dismissed for lack of subject-matter jurisdiction. 28 U.S.C. § 1346(b); see United States v. Sherwood, 312 U.S. 584, 586-87 (1941); Leonhard v. United States, 633 F.2d 599, 624 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981).

G. Claims for Medical Monitoring Expenses

The FTCA does not permit equitable remedies. Moon v. Takisaki, 501 F.2d 389 (9th Cir. 1974). In their prayer for relief, plaintiffs seek "an order declaring the rights of the plaintiffs and ordering medical monitoring at the expense of defendants." Defendants seek dismissal

of plaintiffs' request for medical monitoring on the ground that expenses for medical monitoring are available only in equity, and, as such, are not an available remedy under the FTCA. Plaintiffs contend that an award of expenses for medical monitoring would not be an equitable remedy.

Courts are split on whether medical monitoring constitutes damages recoverable at law or in equity. For instance, in Merry v. Westinghouse Electric Co., 684 F. Supp. 847 (M.D. Pa. 1988), the court allowed a claim for medical monitoring in an FTCA action because such a result was "consistent with Pennsylvania public policy and tort law." Similarly, in Villari v. Terminix International, Inc., 663 F. Supp. 727 (E.D. Pa. 1987), the court found that there was sufficient medical evidence of physical injury to

support the costs of future medical surveillance.

On the other hand, two California district courts have disallowed medical monitoring claims under the FTCA, concluding that such claims sought an equitable remedy. Barth v. Firestone Tire & Rubber Co., 673 F. Supp. 1466 (N.D. Cal. 1987); Burke, et al. v. United States, CV-F-89-455-DLB (E.D. Cal., April 15, 1991). In Burke, the court denied relief primarily on the ground that "there are no specific identifiable medical expenses which are reasonably certain to be incurred in the future."

As in Burke, at this stage of the proceedings in this case, plaintiffs' medical monitoring expenses are not easily calculable. However, as to those expenses that are capable of exact calculation, there is no reason not to characterize

them as damages recoverable under the FTCA. At this time, the court cannot conclude that plaintiffs could prove no set of facts that would entitle them to recovery of medical monitoring expenses. It seems rather likely that with some minimal medical evaluation, the nature of plaintiffs' future medical expenses and need for medical monitoring will be more apparent. Accordingly, the court will deny defendants' motion to dismiss plaintiffs' claim for medical monitoring expenses. Defendants may refile this motion if the nature of plaintiffs' future medical expenses does not become more clear through discovery.

III. CONCLUSION

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) the government's motion to dismiss the claims of the 252 federal employee plaintiffs because such claims present a substantial question of FECA coverage is GRANTED;

(2) the government's motion to dismiss the claims of plaintiffs who filed administrative claims as "spouses of" or "child of" for failure to exhaust administrative remedies is DENIED;

(3) the government is to produce within thirty days from the date of this order the names of all plaintiffs it believes filed no administrative claim, and plaintiffs, within thirty days of receiving the names, are to submit to this court an explanation as to whether it contends these individuals exhausted administrative remedies;

(4) the government's motion to dismiss claims brought pursuant to the

Guam Toxic Substances Exposure Compensation Act is GRANTED;

(5) the law governing the liability of the parties will be the law of Guam on exposure to toxic substances prior to the passage of TSECA;

(6) the government's motion to dismiss plaintiffs' request for prejudgment interest and attorneys fees is GRANTED;

(7) the government's motion to dismiss plaintiffs' cause of action based on ultrahazardous activity or strict liability is GRANTED; and

(8) the government's motion to dismiss plaintiffs' request for medical monitoring expenses is DENIED with leave to refile.

DATED at Seattle, Washington this 17th day of January, 1992.

/s/
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

ELADIO T. FIGUEROA, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	No. CIV91-00030 ORDER DENYING THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

THIS MATTER comes before the court on the individual defendants' motion to dismiss all claims against them. Having reviewed the matter, together with all documents filed in support and in opposition, and having heard oral argument, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiffs, workers at the Piti Power Plant in Guam and their relatives, filed this action against the United States and twelve individuals for damages arising from the May 26, 1987, transformer explosion at the plant. Plaintiffs sixth cause of action is a constitutional tort claim, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), against the individual defendants, who are various naval officers in charge of operating the power plant and doctors who either performed early examinations on patients or attempted to learn the danger from re-entering the power plant after the explosion. Plaintiffs allege that the individual defendants, acting in their official capacities, knowingly and with deliberate indifference for plaintiffs' safety, exposed plaintiffs to PCBs, dioxins and furans, thereby depriving them

of substantive due process rights guaranteed by the Fifth Amendment.[1]

Individual defendants A.D. Loizeaux, G.E. Monroe, T.J. Johnson, Ralph Cugowski, John Doyle, Roger Natsuhara, James Hannigan, Ole Oleson, Robert Bieniasz, Lyndle Burton, Donald Sprague, and Jesus Lizama now move to dismiss the action against them on the grounds that plaintiffs fail to state a claim against them.

II. DISCUSSION

Under Fed. R. Civ. P. 12(b)(6), a complaint should not be dismissed unless it appears beyond doubt that the

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[1]In their complaint, plaintiffs also alleged a Tenth Amendment claim against the individual defendants. However, at oral argument, plaintiffs stated that they are not pursuing their Tenth Amendment claim. In addition, the parties have resolved the question of service of process raised in defendants' motion.

plaintiffs can prove no set of facts that would entitle them to relief. Conley v. Gibson, 335 U.S. 41, 45, 47-48, (1957); California Dump Truck Owners Ass'n v. Associated Gen. Contractors, 562 F.2d 607, 614 (9th Cir. 1977). Even if dismissal is appropriate, plaintiffs should still have the opportunity to amend their complaint when it appears that a more carefully drafted complaint might state a claim upon which relief could be granted. Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985); see also Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962).

The individual defendants argue that plaintiffs Fifth Amendment Substantive Due Process cause of action fails to assert a violation of a protected constitutional right, that plaintiffs have failed to plead sufficient facts in support of their Fifth Amendment Substantive Due Process

claim, and that even if plaintiffs have stated a constitutional right and have plead sufficient facts in support of their claim, the individual defendants are insulated from liability through qualified immunity.

A. Fifth Amendment Substantive Due Process Claim

To state a constitutional tort claim under the substantive due process clause of the Fifth Amendment, plaintiffs must allege government conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), that is offensive to principles inherent in the "concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), or that "offends rights so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

The parties dispute the nature of the constitutional right guaranteed by the substantive due process clause asserted in plaintiffs' sixth cause of action. Based on the language in the complaint, defendants argue that plaintiffs' claim a violation of their constitutional right to be free from exposure to toxic or otherwise harmful chemicals. Complaint, ¶¶ 19, 22. It is clear that there is no constitutional right to be free from exposure to harmful environmental conditions. See, e.g., In re "Agent Orange" Product Liability Litigation, 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (no constitutional claim arises from exposure to toxic chemicals in defoliant); Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181, 185 (D.D.C. 1978), aff'd, 598 F.2d 310 (D.C. Cir.), cert. denied, 444 U.S. 926 (1979)

(no constitutional right to be free from exposure to harmful chemicals in second-hand smoke).

Plaintiffs, on the other hand, contend that defendants misinterpret the constitutional right asserted in their sixth cause of action. Plaintiffs assert that they allege a violation of their liberty interest to be "secure in one's person." Plaintiffs further argue that the environmental harm cases cited by defendants are inapposite. They contend that this case is more like the cases in which courts have found a violation of an individual's constitutional rights where government officials have deliberately placed the individual in a position of known danger. Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 111 S.Ct. 341 (1990); Ward v. City of San Jose, 737 F. Supp. 1502 (N.D. Cal. 1990).

Plaintiffs focus on the affirmative action and intent of the government officials, arguing that they may bring a constitutional tort claim where the government officials have deliberately acted to place an individual in a position of danger or where the officials acted with deliberate indifference to plaintiffs' liberty interests by placing them in a position of known danger. Plaintiffs argue that defendants here purposely placed them in a position of danger by requiring them to enter the plant to clean up after the explosion, by continuing to operate the power plant after the explosion even though they knew of the dangers of exposure to the materials released during the explosion and by giving the plaintiffs who returned to work inadequate safety gear. Plaintiffs further argue that violations

of regulations designed to protect them from exposure to hazardous substances provides a plausible basis for a finding that defendants acted with the requisite intent, i.e. deliberate indifference.

Defendants respond that plaintiffs' assertion of a general constitutional right to be secure in their persons must be narrowed to the specific situation in which the right is asserted. Defendants point out that the right to be secure in one's person or the right not to be placed in a position of known danger is recognized only in situations involving police officers or prison guards. Defendants further argue that when plaintiffs' claim is brought down to its narrower factual context, it still must be described as the right not to be exposed to harmful environmental conditions, which is not a recognized constitutional right.

Defendants' argument is incomplete. Although the constitutional right not to be placed in danger by a government official usually is raised in cases involving law enforcement or correctional officers, the language of those decisions makes clear that the asserted constitutional right is not so narrow. Ward, 737 F. Supp. at 1509 ("many courts have established a person's right to be free from being placed in a dangerous situation by a police officer or other government employee." (emphasis supplied)). Rather, these cases turn on whether the government official has affirmatively acted to place the individual in danger or whether he has merely not interceded to prevent a harm he knew about but did not create. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

In Wood the defendant police officer had arrested the driver of the car in which plaintiff was a passenger, ordered the car impounded, and left the plaintiff at the side of the road in a high crime area. The plaintiff was raped later that evening. The Ninth Circuit held that this was enough to raise a question of fact as to whether the officer had placed plaintiff in a position of known danger, thereby exhibiting deliberate indifference to her constitutional right to be secure in her person. Wood, 879 F.2d at 589. In DeShaney, on the other hand, the county social services agency knew that a juvenile had been abused by his father but did not remove him from his father's home. The Supreme Court held that the defendant had done nothing to create the danger the juvenile faced and that government officials did not have a duty to rescue

individuals from the violent actions of a third party.

Defendants also argue that plaintiffs are attempting to create a constitutional tort claim by asserting that the defendants acted intentionally and deliberately. See Daniels v. Williams, 474 U.S. 327, 332 (1986), citing Paul v. Davis, 424 U.S. 693, 701 (1976). Defendants state that there is always some level of intent or deliberation in any government policy. Defendants analogize this case to Federal Employees for Non-Smokers' Rights, 446 F. Supp. 181, where the plaintiffs complained of a U.S. government policy of tolerating cigarette smoking in federal buildings. Defendants argue that this policy would necessarily be the product of someone's deliberate or intentional conduct but that still does

not mean there is a right to be free from environmental harm.

In establishing violation of the constitutional right not to be placed in danger, the inquiries into intent and affirmative action are separate. Before addressing intent, the court must first determine that plaintiffs have asserted a protected constitutional right. See DeShaney, 489 U.S. at 202 n.10. That asserted constitutional right in this case hinges on whether defendants affirmatively acted to place plaintiffs in danger rather than merely failing to intercede to protect plaintiffs from danger they had no part in creating. Plaintiffs here clearly assert that the individual defendants affirmatively acted to place them in danger by continuing to operate the power plant, by requiring [sic] to return them

to work and by failing to provide them with adequate protective equipment.

The governmental action in the environmental harm cases differs from the governmental action that plaintiffs assert violated their rights in this case. In cases such as Federal Employees for Non-Smokers' Rights, government officials failed to intervene to protect employees from a latent danger in the workplace. However, the explosion at the Piti Power Plant was a discrete, identifiable event after which, according to plaintiffs, the officials in charge of operating the plant required the employees to return to the site of the explosion. Accordingly, the court determines that plaintiffs have asserted a protected constitutional right.

Only after a determination that plaintiffs have asserted a protected constitutional right does the question of

whether defendants acted with the requisite intent becomes relevant. Conduct that is merely negligent does not violate the substantive due process clause. Daniels, 474 U.S. 327. Since Daniels, courts increasingly have adopted an intentional or deliberate indifference standard for constitutional torts. See Wilson v. Seiter, 111 S. Ct. 2321, 2325-27 (1991), Wood, 879 F.2d at 588. Plaintiffs argue that deliberate indifference can be shown by the failure of a government official to perform specific duties to protect citizens from harm. Woodrum v. Woodward County, Okl., 866 F.2d 1121, 1126 (9th Cir. 1989); DOE v. New York City Dep't of Social Services, 649 F.2d 134, 145 (2d Cir. 1981). Plaintiffs further argue that the individual defendants' failure to follow safety regulations designed to protect plaintiffs from

exposure to harmful chemicals exhibits deliberate indifference. The court finds that based on the facts plead by plaintiffs, a finder of fact plausibly could conclude that the individual defendants were deliberately indifferent to plaintiffs' safety when the individual defendants required plaintiffs to return to work.

B. Adequacy of Facts Stated in Support of Claim

Defendants next argue that even if plaintiffs have adequately stated a constitutional right, they have not plead adequate facts in support of their claim.

In cases where violation of a constitutional right includes an element of the government officials' subjective intent, the Ninth Circuit has adopted a heightened pleading standard under which plaintiffs must state in their complaint

nonconclusory allegations setting forth evidence of unlawful intent. Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991).

In their sixth cause of action, plaintiffs allege that the individual defendants "knowingly and negligently exposed the plaintiffs to PCBs, dioxins and furans, and have injured the plaintiffs and deprived them of life, liberty and property in violation of the Fifth and Tenth Amendments of the United States Constitution." Complaint, ¶ 33. Plaintiffs acknowledge that at this stage they have done little more than describe the time and place of the conduct and the identity of allegedly responsible officials. They state that it is their intention, upon finding out which individual defendants actually decided to re-open the power plant and to require

plaintiffs to return to work, to dismiss the action against the other individual defendants.

The court agrees that plaintiffs should have the opportunity to do some discovery after which they can amend their complaint to identify specifically which individual defendants participated in the decision to require plaintiffs to return to work. In light of the way that plaintiffs have characterized their constitutional tort, it appears to the court that not all of the individual defendants would have acted affirmatively and with recklessness or deliberate indifference. For example, an individual defendant who knew about the potential danger plaintiffs' faced in returning to work and did nothing to prevent them from returning to work but at the same time did not participate in the decision to require

them to return to work would not have affirmatively acted to place plaintiffs in danger. In addition, it would appear that a doctor who merely examined plaintiffs and determined they were not suffering any ill effects from working at the plant immediately after the explosion also would not be affirmatively acting so as to violate plaintiffs' constitutional rights.

Plaintiffs have until March 31, 1992, to amend their complaint with more specific facts linking the individual defendants with the alleged violation of plaintiffs' constitutional rights.

D. Doctrine of Qualified Immunity

"Government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." Harlow v. Fitzgerald, 457 U.S. 818 (1982). Government officials are presumed to have knowledge of clearly established law and to be able to act reasonably with respect to that law. A determination of whether the qualified immunity doctrine applies in a particular case focuses on two inquiries: (1) whether the constitutional rights allegedly violated were clearly established at the time of defendants' conduct; and (2) whether defendants' conduct was objectively reasonable with reference to the clearly established law.

The operation of these standards interacts with the level of generality at which plaintiffs' constitutional right is identified. Andersen v. Creighton, et al., 485 U.S. 635, 639 (1987). For example, the more general the level at which plaintiffs' constitutional right is

identified, the less likely it would be that the law would be clearly established for application in a particular situation and the less likely it would be that the government officials' conduct would be unreasonable with reference to the law. As the Supreme Court stated in Andersen,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official actor is protected by qualified immunity unless the very action in question previously has been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640.

Defendants argue that if plaintiffs' asserted constitutional right is interpreted as the right to be secure in one's person or the right not to be placed in danger, that constitutional right was not clearly established in the context of

a situation where the known danger was environmental harm at the time of the transformer explosion. Defendants argue that the individual defendants here could have been expected to be aware of two lines of cases, those holding that there is no constitutional right to be free from environmental harm and those finding a constitutional right to be secure in one's person. Defendants conclude that any reasonable official with knowledge of these two lines of cases would have concluded that they were not violating any constitutional right by requiring plaintiffs to return to work to operate the power plant and to clean up an environmentally harmful spill.

In addition, defendants argue that even if this constitutional right was clearly established, their actions, viewed objectively, were reasonable. Defendants

point out that individuals entering the power plant were issued protective equipment based on the areas they would be working in and on the known level of exposure they would be facing. They also argue that the GAO found that there were sound reasons for continuing the operation of the power plant, primarily the need for the plant as a key source of power on Guam.

Plaintiffs, on the other hand, argue that because decisions finding that it was a violation of the substantive due process rights for government officials affirmatively to place a person in a position of danger predated the explosion and because defendants must be presumed to be aware of all available decisional law, Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986), cert. denied, 483 U.S. 1020 (1987), defendants are not

entitled to a defense of qualified immunity. Plaintiffs focus specifically on the Ninth Circuit's decision in Wood, which relied in part on White v. Rochford, 592 F.2d 381 (7th Cir. 1979). Plaintiffs argue that both Wood and White emphasize the government officials' "indifference in the face of known dangers," of a high degree although the dangers came from quite difference sources. Thus, plaintiffs conclude that the constitutional right not to be placed in known danger or to be free from governmental officials' indifference in the face of known danger was well established in 1987.

The court agrees with plaintiffs. Violation of a constitutional right need not have taken place in the identical factual context for the right to be clearly established. Exposure to toxic

materials from the explosion was a known danger from an identifiable, discrete source. The case law finding constitutional violations where government officials placed individuals in known danger predated the explosion. In addition, in light of this known danger, it simply cannot be reasonable for government officials to choose continued power generation over the safety of the power plant employees. Furthermore, plaintiffs have alleged that the protective gear supplied by the defendants was grossly inadequate. Without additional information, the court cannot determine whether the decision to provide certain protective gear was objectively reasonable. Accordingly, taking the facts as plaintiffs allege them, the court finds that defendants are not entitled to

application of the doctrine of qualified immunity to protect them from liability.

III. CONCLUSION

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) the individual defendants' motion to dismiss for failure to state a claim is DENIED; and

(2) plaintiffs are to file an amended complaint identifying which individual defendants it is proceeding against no later than March 31, 1992.

DATED at Seattle, Washington this 19th day of December, 1991.

/s/
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

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